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No. 2387

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

HENRY BRAHENBERG,

Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Territory of Alaska, Third Division.

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FILED

APR 16 1914



Records of H. S. Brent  
and of appeals  
865





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,  
Third Division.*

**Names and Addresses of Attorneys of Record.**

WM. A. GILMORE, 300 Central Bldg., Seattle,  
Wash.,

JOHN LYONS, Valdez, Alaska,

Attorneys for Plaintiff and Plaintiff in  
Error.

E. E. RITCHIE, Valdez, Alaska,

Attorney for Defendant and Defendant in  
Error. [1\*]

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*In the District Court for the Territory of Alaska,  
Third Division.*

No. S.—33.

CACHE CREEK MINING COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

**Complaint.**

The plaintiff for its cause of action against the de-  
fendant complains and alleges:

I.

That this plaintiff now is and during all of the  
times hereinafter mentioned was a corporation duly  
and legally organized and existing under and by vir-

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\*Page-number appearing at foot of page of original certified Record.



tue of the laws of the State of Washington, with its principal place of business in Seattle; that it has property and business in the Territory of Alaska, and that it has complied with all the Alaskan laws regarding foreign corporations of the Territory of Alaska, and that C. E. Brown of Seward, Alaska, is its duly authorized agent and officer upon whom may be served all legal processes and notices found necessary to be served in order to obtain jurisdiction of this plaintiff in any court action.

## II.

That heretofore, to wit, on July 28, 1905, one Joseph Anderson located in his own name and right, in manner and form as provided by law, Claim Number One above on Dollar Creek, a tributary of Cache Creek in the Yentna mining district of Alaska; that due notice thereof was given and that said location was by the Commissioner regularly received and filed, and is now recorded in Book 1 at page 60 of the Commissioner's office at Susitna; that thereafter the said Joseph Anderson, for a valuable consideration, transferred, sold and set over unto this plaintiff [2] all of his right, title and interest therein, and thereto, and this plaintiff thereon became the owner thereof and since it has acquired same has been entitled to all of the possessory rights and mining rights thereto and therein under the laws of the United States of the Territory of Alaska, and that this plaintiff has in each year since said time, in due and regular form and manner, done, made and performed the full amount of the assessment work and development work upon said mining claims as is required by ex-



isting laws, and that proof thereof has been on each year regularly filed, and is now on file in the office of the Commissioner of the United States Court in the said town of Susitna in said District.

### III.

That heretofore, to wit, in the year 1912, at a date unknown to this plaintiff, the defendant, Henry Brahenburg, did trespass upon, go upon and unlawfully, wrongfully, without any right or any legal authority in law so to do, attempt to and did "jump" and take possession of all the premises above described, the same being the property of this plaintiff, and that he, the said defendant, did wrongfully continue to hold and still holds the possession thereof, and did commence to work on said claim by sluicing out a cut, putting in flumes, and commenced to and did sluice, pan and mine and otherwise seek to and did extract gold and precious minerals from the earth on said claim, all of the property of this plaintiff, to this plaintiff's damage in the sum of Five Thousand (\$5,000.00) Dollars.

### IV.

That the defendant still threatens to and continues to do such sluicing and mining upon the said claim aforesaid, the property of the plaintiff, which the plaintiff alleges to be valuable property upon which it has expended large sums of *of* money, time and labor, and that it would suffer thereby irreparable [3] losses for which there is for this plaintiff no adequate remedy in law save that of a restraining order and injunction from this Honorable Court commanding and prohibiting the said defendant from

going upon said premises, to engage in sluicing and mining thereon and in otherwise take gold or other precious minerals from the earth upon said claim.

V.

Plaintiff alleges that the defendant is insolvent and that no money judgment could be collected; that this plaintiff has not a full and complete and adequate remedy at law whereby it could be reimbursed and made whole for any trespassing upon said claim by the defendant; that this plaintiff will suffer irreparable losses and a great injustice unless this action is assisted in equity and a restraining order issued from this Court prohibiting the defendant, his associates, agents, servants and employees or anyone claiming under him or through him, as licensee or otherwise, from going upon, or remaining upon the premises of this plaintiff hereinbefore described.

VI.

This plaintiff alleges that the defendant has mined and sluiced from said premises fully ten thousand cubic square yards, which is of the reasonable value of fifty cents per yard, whereby this plaintiff has become damaged in the sum of Five Thousand (\$5,000.00) Dollars.

WHEREFORE, this plaintiff prays this Honorable Court as follows:

First: For a writ of ouster forever ejecting the defendant, his associates, agents, servants and employees or any person or persons whatsoever claiming under or through him, from going upon, mining or in any otherwise interfering with said premises.

Second: That until the final determination of this

action that this plaintiff have a restraining order or [4] temporary injunction restraining and enjoining the defendant, his associates, agents, servants, and employees from going upon said premises or continuing to mine thereupon or in any wise interfere therewith.

Third: For a judgment against the defendant for plaintiff's damage in the sum of Five Thousand (\$5,000.00) Dollars and finally for all other and further relief to which this plaintiff may in law and equity be entitled.

BROWN & LYONS,  
Attorneys for Plaintiff.

United States of America,  
Territory of Alaska,—ss.

I, Joseph Anderson, being first duly sworn depose and say: That I am the manager of the Cache Creek Mining Co., the plaintiff named in the above-entitled action, and that the foregoing Complaint is true as I verily believe.

JOSEPH ANDERSON,

Subscribed and sworn to before me this 27th day of March, A. D. 1913.

[Seal]

JOHN LYONS,  
Notary Public for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. March 27, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

[5]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. S.—33.

CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

HENRY BAHRENBURG,

Defendant.

**Answer.**

Answering plaintiff's complaint defendant says:

I.

He neither admits nor denies the allegations of paragraph I.

II.

He admits that Joseph Anderson located Claim Number One above on Dollar Creek, and that he thereafter conveyed his interest in said claim to plaintiff, as alleged, but denies that plaintiff has performed the annual labor required by law to hold said claim since the year 1909, denies that it has performed any labor upon said claim since 1909, and alleges that all of plaintiff's right to and in said claim became forfeited and the said claim and all of it became a part of the public domain, subject to location according to law as mineral land long prior to the year 1912. Defendant alleges that on the 1st day of August, 1912, he located said Claim Number One above discovery on Dollar Creek according to law, and ever since has been and now is the owner



thereof, subject to the paramount title of the United States, and is in actual possession thereof.

### III.

Defendant admits that he went upon said claim in the year 1912, as stated in the preceding paragraph, but denies [6] that he was a trespasser, that his said action was unlawful or wrongful, or without authority in law; denies that he "jumped" said claim, or any part thereof; denies that it was the property of plaintiff, or is now. Defendant admits that he holds possession of said claim but denies that he holds it, or any part of it, wrongfully. He admits that he has done mining work on said claim, but denies that he extracted therefrom any gold or other precious mineral which was the property of plaintiff; denies that the gold and other mineral extracted from said claim by him was so taken to the damage of plaintiff in the sum of Five Thousand Dollars, or any other sum.

### IV.

Defendant denies that plaintiff has expended large sums of money, time and labor, or any money, time or labor whatever, upon said claim Number One; denies that by reason of or through defendant's mining or other operations on said claim it will suffer irreparable losses, or any loss whatever; denies that plaintiff has no adequate remedy at law for any damage it may suffer in the premises.

### V.

Defendant denies each and every, all and singular, the averments of paragraph V of plaintiff's complaint.

## VI.

Defendant denies that he has mined and sluiced from said claim ten thousand cubic square yards, or cubic yards, or any other quantity exceeding Five Hundred and Sixty-three (563) cubic yards of earth, gravel and rock; denies that the earth, rock and gravel removed was or is of the value of fifty cents a yard, or any other sum in excess of two dollars for the whole quantity mined and sluiced. He denies that by such mining and sluicing plaintiff was damaged five thousand dollars or any sum whatever.

By way of cross-complaint defendant alleges that [7] he located said Claim Number One above discovery according to law, and thereafter within ninety days, to wit, on the —— day of August, 1912, filed a copy of his notice of location thereof in the office of the recorder of Cook Inlet precinct, in which said claim is situated, and has ever since said location had actual possession of the same.

Wherefore defendant prays that plaintiff take nothing by its complaint and that on the final hearing of this cause he may be decreed to be the owner of said Claim Number One, subject only to the paramount title of the United States, and that plaintiff has no interest therein, and that defendant have such other and further relief as the Court may find him entitled to in equity and good conscience.

E. E. RITCHIE,  
Attorney for Defendant.

United States of America,  
Territory of Alaska,—ss.

Henry Bahrenburg, being duly sworn, says that he

is the defendant in this suit; that he has read the foregoing answer and he believes the same to be true.

H. BAHRENBURG.

Sworn to and subscribed before me this 2d day of June, 1913.

[Seal]

W. H. CRARY,  
Notary Public.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 2, 1913. Angus McBride, Clerk. By V. A. Paine, Deputy. [8]

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*In the District Court for the District of Alaska,  
Third Division.*

CACHE CREEK MINING COMPANY, a Corporation,

Plaintiff,

vs.

HENRY BAHRENBURG,

Defendant.

**Reply.**

The plaintiff for Reply to the affirmative matter set up in defendant's answer herein, says and alleges:

First: It denies each and every allegation and averment in said affirmative answer contained.

Wherefore plaintiff prays judgment as in its complaint prayed for.

BROWN & LYONS,  
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 3, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

United States of America,  
Territory of Alaska,—ss.

I, M. McDougal, being first duly sworn, depose and say: That I am the President of the plaintiff corporation named in the above-entitled action, and that the foregoing Reply is true as I verily believe.

M. McDOUGALL.

Subscribed and sworn to before me this 2 day of June, A. D. 1913.

[Seal]

GEO. J. LOVE,  
Notary Public for Alaska. [9]



[Defendant's Exhibit No. 1 —Photograph.]



[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit No. 1. Received March 10, 1914. F. D. Monckton, Clerk.

[Defendant's Exhibit No. 2—Photograph.]



[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit No. 2. Received March 10, 1914. F. D. Monckton, Clerk.

[Defendant's Exhibit No. 3.—Photograph.]



[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit No. 3. Received March 10, 1914. F. D. Monckton, Clerk.



**Defendant's Exhibit No. 4 [Notice of Location of  
Placer Claim].**

**NOTICE OF LOCATION OF PLACIER CLAIM.**

Notice is hereby given. That the undersigned having complied with the requirements of Chapter 814 of Title Thirty-two of the Revised Statutes of the United States and local customs laws and regulation has located this 20 acres of Placier mining ground situated in the Cooks Inlet Mining District, Alaska, described as follows commencing at this upper center line post No. 1 running down the stream 1320 feet to lower center line post No. 2 with 330 feet on each side of center line. Said claim being known as No. 1 above situated on Dollar Creek about five miles from its mouth tributary to Cache creek.

Discovered August 1, 1912.

Located August 1, 1912.

Locator—H. BAHRENBURG.

Witness:

Aug. 1st. LOUIS BUB.

[Endorsed]:

123.

United States of America, Territory of Alaska,  
Third Division.

Filed for record at request of H. Bahrenburg, on the 31 day of Aug. 1912, at 17 minutes past 4 P. M., and recorded in volume 2 of Min. Loc., page 630, records of Cook Inlet, Precinct Alaska. Lee Van

Slyke, U. S. Commissioner and Ex-officio Recorder.  
Deputy —————.

Indexed. [In pencil:] Aug. 31st, 4:17 P. M.

No. 2387. U. S. Circuit Court of Appeals for the  
Ninth Circuit. Defendant's Exhibit No. 4. Re-  
ceived March 10, 1914. F. D. Monckton, Clerk.



a.







PLANTIFFS EXH. B - 1A

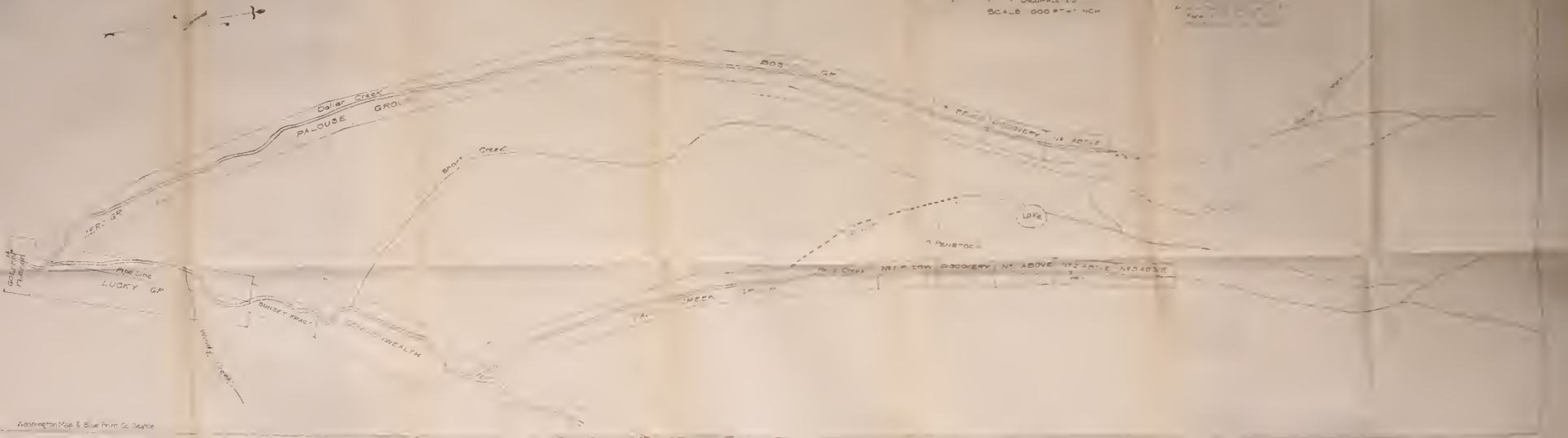
Diagram of Ditch System of Dollar & Falls Creeks

DITCH SYSTEM  
OF

DOLLAR & FALLS CREEKS

DITCHES SHOWN THIS COMPLETED  
UNCOMPLETED

SCALE 1000 FT. = 1 INCH





CACHE CREEK MINING CO. v. BRAHEN-  
BURG—S/33. [10]

*In the District Court for the Territory of Alaska,  
Third Division.*

No. S/33.

CACHE CREEK MINING COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

**Writ of Error and Transcript of Evidence.**

BE IT REMEMBERED, that the above-entitled cause came on duly and regularly to be heard on Tuesday, November 25, 1913, at 11 o'clock A. M., before the Honorable ROBERT W. JENNINGS, Judge of the District Court for the Territory of Alaska (assigned to the First Division and presiding in the Third Division at this time by direction of the Attorney General) and a Jury:

The plaintiff being represented by its attorney and counsel, JOHN LYONS, Esq.

The defendant being represented by his attorney and counsel, E. E. RITCHIE, Esq.

A jury having been empaneled opening statements were made by the respective counsel.

WHEREUPON the following additional proceedings were had and done: [11]

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[**Testimony of Joseph Anderson, for Plaintiff.**]

JOSEPH ANDERSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

## Direct Examination.

(By Mr. LYONS.)

Q. What is your name? A. Joseph Anderson.

Q. What is your occupation? A. Miner.

Q. Where? A. The Cache Creek country.

Q. Do you know of the Cache Creek Mining Company, the plaintiff in this action? A. I do.

Q. What has been your relation to that company for the last three years?

A. I have been superintendent on the ground and manager.

Q. Where is this ground?

A. The claim in dispute—Number 1 above discovery on Dollar Creek.

(Testimony of Joseph Anderson.)

Q. What part of the country is it in?

A. It is in the Yetna Mining District on Dollar Creek, a tributary of Cache Creek.

Q. Territory of Alaska?

A. Territory of Alaska.

Q. I hand you this map—state what that is.

A. It is a map showing all of the claims on Dollar Creek owned by the Cache Creek Mining Company; also the claims on Falls Creek owned by the Cache Creek Mining Company and five locations on Cache Creek, together with the ditches on the ground, finished and unfinished.

Q. Who made that map? [13\*—2†]

A. A civil engineer made a map same as this with the exception of the ditches which were filled in by George Eberhardt and myself.

Q. Who is George Eberhardt?

A. He is my partner, was my partner in the location of discovery and Number 1—one above on Dollar Creek, and a stockholder in the Cache Creek Mining Company.

Q. Does that map represent the true situation and location of the company's property on these different streams?

A. It does—it was made by a competent engineer.

Q. Who was he?      A. Mr. Mattison.

Q. What is his entire name, if you know?

A. I don't remember that.

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\*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.



(Testimony of Joseph Anderson.)

Mr. RITCHIE.—If it is a substantially accurate map there will be no objection to it.

The WITNESS.—It is a blue-print taken off the original map made by him.

Mr. RITCHIE.—We make no objection to the introduction of the map. We, of course, object to any testimony with reference to any claims not involved in this action, but no objection to the map.

The map is admitted in evidence, marked Plaintiff's Exhibit "A"—is attached hereto and made a part hereof.

Q. Do you know where the claim known as Number 1 above discovery on Dollar Creek, a tributary of Cache Creek, is?     A. I do.

Q. Who is the locator of that claim?

A. I located the claim.

Mr. RITCHIE.—The pleadings admit Mr. Anderson located it and [14—3] afterwards conveyed it to the Cache Creek Company and that the company did own it a few years ago.

Q. How long have you been working for that company in that section of the country?

A. About the first day of June, 1911.

Q. Did you work for them prior to that time?

A. No—I did a very few days, just helping them to assemble an outfit when the company first went in there to take hold of the proposition.

Q. When were you over there in that country first?     A. 1905.

Q. Were you there in 1906?     A. Yes.

Q. What were you doing that year?

(Testimony of Joseph Anderson.)

A. Mining—working.

Q. Whom were you working for?     A. Myself.

Q. You were not working for the company that year?

A. No. There was no such company that year.

Q. When was this company formed?     A. 1909.

Q. Were you working for the company that year?

A. Only just to help to assemble the outfit at Susitna and Tyonook and get together.

Q. When did you first begin mining in that country for the company?     A. In 1911.

Q. What did you do for the company in 1911?

A. I went in there as foreman in the spring, for the mining end of it and afterwards when Mr. Cameron left, I took [15—4] charge as superintendent.

Q. Who is Cameron?

A. He is one of the stockholders and general manager of the company in there at that time.

Q. Is he a stockholder in the company?

A. Yes, sir, he is a stockholder in the company.

Q. Where does he reside?

A. Seattle, Washington.

Q. What office does he hold with reference to the company?     A. Secretary.

Q. Who is the president of the company?

A. Malcolm McDougall.

Q. Where does he reside?     A. Seattle.

Q. How long did you mine there during the year 1911?

A. I don't know the date we started; they were

(Testimony of Joseph Anderson.)

mining when I arrived there the 26th of May and we closed down the last day of August, actual mining.

Q. How many claims do the company own in that section of country, if you know?

Mr. RITCHIE.—We object to that—it is irrelevant to introduce any testimony here except as to claims which would be connected with this ditch.

Objection sustained. Plaintiff allowed an exception.

Q. How many claims do the company own on Dollar Creek? A. Six.

Q. Now, will you get up there to that map and tell the jury just where those claims are?

A. These are the claims here—the Zero, Palouse, Boston, No. 1 [16—5] below, Discovery and No. 1 above.

Q. Where is that Number 1 above claim on Dollar?

A. Number 1 above discovery?

Q. Is that the claim in dispute in this action?

A. That is the claim in dispute.

Q. Did you do the assessment work on that claim in 1911? A. We did.

Mr. RITCHIE.—As that is preliminary I will not object.

Mr. LYONS.—We have the affidavits of labor here.

Mr. RITCHIE.—They were offered in evidence on the preliminary on injunction and I objected to them on the ground that they did not comply with the requirements of the statute.

By the COURT.—That question is not in issue



(Testimony of Joseph Anderson.)

now—the question is, did you do the assessment work.

Q. Did you do the assessment work on that claim in 1911?

A. I did, not on the claim, but by ditching above it.

Q. Tell the jury how the assessment work was done. Tell them first, where is the stream that is known as Dollar Creek.

A. It is up here—that is a mistake; there is no such branch there; I don't know how that was put in.

Mr. RITCHIE.—Start at the source of Dollar Creek and show how it runs.

Q. Where is the source of Dollar Creek?

A. Here; that is against the snow line. This is Cache Creek here.

Q. What is this other stream over on this side of the map?

A. This is one fork of Falls Creek and this is the other fork; that makes Falls Creek here, adjoining Cache Creek, here. [17—6]

Q. How did you do the assessment work for this claim in the year 1911?

A. By ditching on the bench.

Q. State to the jury where that ditch is on that map.

A. This is the complete ditch here, but it was not all done in 1911. This was done in 1911 (indicating).

Q. Where is the intake of that ditch?

A. There, it will be—it is not complete.

(Testimony of Joseph Anderson.)

Q. On what stream is that?     A. Dollar Creek.

Q. How far is the intake of the ditch from Number 1 above on Dollar Creek, the claim in dispute?

A. Two miles approximately.

Q. Was this ditch surveyed?

A. It was not surveyed by an engineer; no.

Q. Was it surveyed?

A. There was a preliminary line run through with a sight level.

Q. Who did that?     A. I done it.

Q. When did you do that?     A. 1911.

Q. Tell the jury what work was done on the ditch in 1911—on the map there.

A. This is the work that was done, here—this ditch was dug.

Q. What length of ditch was dug in 1911?

A. I measured that with a steel tape this fall, but I left the book with a man I expected here.

Q. As near as you can state.

A. 1600 feet, I think, is the correct measurement—I said 1200 feet in the spring. [18—7]

Q. What time of the year 1911 was that work done?     A. September.

Q. Now, what was done? Tell the jury what was done.

A. The outfit was packed up at Dollar Creek and packed over there with horses and that ditching was in about two feet wide on the bottom and 18 inches on the lower lip and considerably more in places on the upper lip, the upper side.

Q. How many horses were there?     A. Three.

(Testimony of Joseph Anderson.)

Q. How far is it from where you took that outfit to where this ditch is situated?

A. It is about five miles.

Q. How many men were in the outfit?

A. Three besides myself.

Q. Do you know the names of those men?

A. I do.

Q. What were their names?

A. There was Victor Carlson, George Winter and Andy Thomas and Charley Nawn worked at the warehouse and camp, packing up the outfit and things like that; helped us pack the horses.

Q. You were there yourself?

A. I was there myself all the time.

Q. How long were you there?

A. May I refer to my notes?

Q. You may refer to anything you have to refresh your recollection.

The WITNESS.—(Referring to notes.) I was there the 1st, 2d, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th of September.

Q. What is that you hold in your hand there? [19—8]

A. That is a copy I have taken from my books, from my log.

Q. What does your log consist of?

A. Putting down what we do every day and how the men are occupied, etc.

Q. Where is that log?

A. It is up in Cache Creek.

Q. You haven't that with you?

(Testimony of Joseph Anderson.)

A. I didn't bring it.

Q. Is that an exact copy of the log?

A. It is an exact copy.

Q. What did this outfit you took over there consist of?

Mr. RITCHIE.—I think that is irrelevant; the real question is what is the value of the work on the ground.

Objection overruled.

A. Do you want the rest of these names and the days' work?

Q. At this time I will ask another question and get that later. What did your outfit consist of?

A. It consisted of supplies to use in the cook-house, tents, stoves and everything to feed the men, a complete camp; horses, plows, scraper and tools, picks and shovels, etc., and everything that was needed to do that kind of work.

Q. I will ask you how many claims was this work to be applied on, as assessment work.

A. Six claims.

Q. On what stream?      A. Dollar Creek.

Q. Is that all the property of the Cache Creek Mining Co.?

A. All the property of the Cache Creek Mining Company.

Q. Now, what time did you go to work in the month of September on this ditch? [20—9]

A. The 9th.

Q. The 9th of September?

A. The 9th of September.



(Testimony of Joseph Anderson.)

Q. You say you had three horses?

A. Three horses.

Q. How many days were they at work?

A. Nine days.

Q. What were those horses worth each per day in that country at that time?

A. I think I figured them at—

Mr. RITCHIE.—We object to what he figured them at—we want the prevailing rates.

By the COURT.—Answer what they were worth, if you know.

A. There was no prevailing price; there was nobody to use horses there and I figured on what they used in other places that was more accessible than that country is.

By the COURT.—That is the way you got at it?

A. That is the way I got at it.

By the COURT.—I think you may answer, subject to cross-examination, what in your opinion was the worth per day of the horses.

A. I will say roughly \$30 a day to the team of two horses.

Q. Then a horse, according to your way of figuring, was worth about \$15 a day in that country?

A. Yes, sir.

Q. Now, tell the jury how you arrive at those figures, as near as you can.

A. Well, I arrived at them in this way—I figured what it would cost to feed a horse in there and what the horse should be worth working there and what you would have to [21—10] pay for him using



(Testimony of Joseph Anderson.)

him in any other country that is as hard to get into as that is. I know you have to pay that for them in the Iditarod or any other place where they use teams.

Q. What is the price of hay in that country?

Mr. RITCHIE.—We object to that as irrelevant.

Objection sustained.

Q. Now, you say you went to work there along about the 9th of September? A. Yes, sir.

Q. How many men were actually working on the ditch and began to work on that day?

A. On that day there were four.

Q. What did they do, as near as you can recollect?

A. I think on that day we packed up the camp and took everything over to establish camp—I don't remember whether we got started on the ditch that day or not—no, that is not right.

Q. All right, make it right.

A. We camped on Falls Creek and we started to work on the ditch on that day, on Dollar Creek.

Q. What day was that?

A. The 9th of September.

Q. What were those men worth per day?

Mr. RITCHIE.—We want the prevailing wages.

Q. What were the prevailing wages in that section of the country at that time?

A. Five dollars a day and board, the prevailing wages.

Q. Tell the jury, if you know, what was the cost of their [22—11] board in that section of the country at that time, as near as you can.

(Testimony of Joseph Anderson.)

A. Fully three dollars a day.

Q. Three dollars per day per man?

A. Three dollars per day per man, yes, sir.

Q. Did it actually cost the company that, three dollars a day?

A. I think it did—we pay the cook \$125 per month.

Q. And his board?      A. And his board.

Q. Now, what did you do on the tenth of September?      A. Worked on the ditch.

Q. What were the horses doing?      A. Working.

Q. What doing?      A. Plowing, scraping.

Q. How many plows did you have there?

A. One.

Q. What kind of a plow was that?

A. A breaking plow.

Q. Was that land such as could be plowed? Could you do more work with a plow than you could with shovels?      A. A good deal.

Q. How many men would it take to handle that plow?      A. Two.

Q. What were the other men doing?

A. One was cooking and getting wood—there was no wood there—getting wood and such work, camp work, and for myself I was pulling out sod and doing whatever could be done—I don't mean to say that I worked steadily with a pick and shovel, but I was there. [23—12]

Q. Well, how long did you work there then—how long did the camp stay there?

A. We finished on the 16th day of September.

Q. Did you work every day from the 9th until the

(Testimony of Joseph Anderson.)

16th? A. Every day.

Q. Including the 16th of September?

A. Including the 16th of September.

Q. And it is your opinion that there was \$600 worth of work done on that claim? A. Yes, sir.

Q. By this way of doing it?

A. It is my opinion.

Q. Now, you have been engaged in mining for some years? A. Since 1908.

Q. I will ask you as a miner if that work that you did in that ditch tended to the development of the claim Number 1 above on Dollar Creek. A. It did.

Q. In what way?

A. By bringing water from it on the bench, so that it can be piped by hydraulic methods.

Q. How far would you have to bring this water?

A. Two miles, out of the Dollar Creek ditch.

Q. I will ask who decided to put in this ditch.

A. Mr. Cameron and myself.

Q. You were acting as the agents of the company?

A. I was.

Q. You were both acting as agents of the company?

A. Yes, sir, we were both acting as agents of the company.

Q. And after a consideration of the matter you thought it was [24—13] better to work the claims in this way than in any other way?

A. We considered that was the cheapest method of working that ground.

Q. Now, I will ask you how this Number One



(Testimony of Joseph Anderson.)

above on Dollar Creek can be worked after this ditch is put there.

A. By putting in a penstock at the end of the ditch and connecting it up with pipe and bringing it down into the bottom of the ground and piping out the bottom and then the bench.

Q. You say this claim, Number 1 above on Dollar is right on Dollar Creek?

A. It is on Dollar Creek.

Q. And how far would the creek be from that after it is constructed through?

A. It is about 1500 feet from the rim.

Q. What kind of values are there in this Number 1 above on Dollar Creek—is it a low-grade proposition?

A. Yes, it is a low-grade proposition—the best pay made off of it is about \$22 a day, pick and shovel work.

Q. Isn't that pretty good pay?

A. Yes, if it would run that right along, but it won't average that.

Q. Have you ever measured up the gravel on the ground?     A. The gravel mined?

Q. The gravel on the ground which is possible—on the ground Number 1 above, on Dollar?

A. No, I have not.

Q. You don't know about how many cubic yards there are on the ground?     [25—14]

A. No, I do not.

Q. Is the pay deep or otherwise?

A. The creek channel was only about an average

(Testimony of Joseph Anderson.)

of about three feet deep before the tailings were put on there and the low bars will average about the same, the creek bars.

Q. Then the construction of this ditch was planned and put in operation by yourself and Mr. Cameron? A. It was.

Q. As the manager and secretary of the company?

A. It was.

Q. When was that decided to be done?

A. In August, 1911.

Q. Was Mr. Cameron on the ground at that time?

A. He was.

Q. Is Mr. Cameron one of the large stockholders of the company?

A. He is a stockholder—he is one of the largest.

Q. Are you a stockholder in the company?

A. I am.

Q. You say you brought some scrapers over there?

A. One scraper.

Q. What did you do with the scraper?

A. Used it for hauling out the dirt, out of the ditch,—making the ditch.

Q. Is it your intention to finish this ditch?

A. It is.

Mr. RITCHIE.—You mean the company's intention?

Judge LYONS.—Yes, sir.

#### AFTERNOON SESSION.

Q. I want you to tell the jury what these lines represent drawn this way. [26—15]

A. That represents the finished part of the ditch.



(Testimony of Joseph Anderson.)

Mr. RITCHIE.—The way it is now?

A. The way it is now.

Q. What do these dotted lines represent?

A. It represents where the ditch is going.

Q. Is that finished or unfinished?

A. Unfinished.

Q. Where does this ditch run to?

A. It runs into the right-hand fork of Falls Creek, looking down the stream.

Mr. RITCHIE.—We move to strike that as having no bearing on the issues.

Judge LYONS.—I want to show the good faith of the company and their intentions there in building this line of ditches.

By the COURT.—I will overrule the objection, but you cannot go into that to a very great extent.

Q. You say this ditch taps Falls Creek?

A. Yes, sir.

Q. I will ask you if water taken out of Falls Creek into this ditch, how that will benefit the Number 1 above discovery claim?

A. It can be brought around and the intention is to bring it around so it can join the two ditches, water from the two ditches.

Q. That is this ditch here (indicating)?

A. That ditch.

Q. What is this here?

A. That is the way this ditch was intended to go originally, the work done in 1911, but after I started this ditch Mr. Brahenburg put in a new one here and headed me off and I [27—16] consequently had

(Testimony of Joseph Anderson.)

to make this swing here to get up—I abandoned this here.

Q. The water taken out of Falls Creek and the water taken out of Dollar Creek either may be used for hydraulic purposes in extracting the gold from Number 1 above discovery claim?

A. That is the intention.

Q. That can be done?

A. That can be done—on all the claims on Dollar Creek.

Q. Belonging to this company?

A. Yes, it can be extended on down here.

Q. I will ask you if there is plenty of water in Dollar Creek at all times of the year.

A. No, there is not.

Q. Do you know if it is the intention of the company to compete this ditch line according as it is planned here?

A. That is the intention.

Judge LYONS.—That's all.

Cross-examination.

(By Mr. RITCHIE.)

Q. You say there is no large quantity of water in Dollar Creek all the year?

A. No, there is not, not in low water.

Q. What is the period of low water, after the early summer floods?

A. I judge about 200 inches.

Q. I mean what time is the water high?

A. In June, part of July and when the fall rains set in.

Q. Is there high water in August?

A. Sometimes.

(Testimony of Joseph Anderson.)

Q. About how much water is there in August?  
[28—17]

A. It varies—in the streams there is lots of water comes down, probably three or four hundred inches.

Q. How much water is there in September?

A. That varies also—the year before last, 1911 and 1912, were wet seasons and it was a stage of high water in both years in September.

Q. Is the water in the creek, after the winter snows are melted in the spring, mostly traceable to rainfall, that is, does the snow melt all summer to any extent so as to add to the volume of the stream?

A. On the upper end of the stream, up at its source.

Q. But the rainfall has a great deal to do with the flow in the middle and latter part of the summer?

A. Yes, sir.

Q. And if there is no rainfall the flow in the stream is very much less than it would be if there was rain?      A. Yes.

Q. And in the dry season how low does it ordinarily fall?      A. Well, about 200 inches.

Q. Now, Mr. Brahenburg and Mr. Bubb are mining in the gulch that leads into Dollar Creek just about or on the side of Number 1 above discovery?

A. They are mining right on Dollar Creek bench; it is right on the line of Number 1 above, just above the line.

Q. Their property, where they are working now, is just off of Number 1 above discovery, is it not?

A. Yes.



(Testimony of Joseph Anderson.)

Q. Point out on the map where this gulch is that they are working on.

A. The gulch is right in there (indicating) and they are working [29—18] here (indicating).

Q. The gulch is about here? A. Yes, sir.

Q. It is not indicated on that map?

A. It is not indicated on that map, no—it comes right down here.

Q. How long have they been working there on that gulch to your knowledge?

A. To my knowledge they were working there in the spring of 1911.

Q. They located property there in the spring of 1910, did they not?

A. That I can't say—I wasn't there.

Q. When did they divert water from the upper part of Dollar Creek—you spoke of their having a ditch?

A. Well, the second ditch they put in in 1912.

Q. Do you know when they put in the first ditch?

A. I do not.

Q. How much water did that first ditch carry?

A. Why, less than 100 inches, I should judge.

Q. Don't they, as a matter of fact, use all the water in Dollar Creek excepting when the volume is large, in flood seasons?

A. They do now, use the most of it.

Q. So if you completed the ditch, there would be no water left?

A. In low water there wouldn't be but very little left.

(Testimony of Joseph Anderson.)

Q. The periods of low water are a considerable part of the season there, are they not?

A. Well, about half an ordinary season.

Q. How long does the season last there—when does it begin and [30—19] when end, ordinarily?

A. From about the first of June until the 20th of September or the first of October.

Q. And what ends the season, low water?

A. Cold weather.

Q. And then the water supply also is cut off about the same time?      A. It gets low.

Q. Now, this work you did on that ditch in 1911—you first told Judge Lyons that you were on the ground on the first, second, 6th and then from the 9th to the 14th continuously—9th, 10th, 11th, 12th, 13th and 14th?      A. And 16th, I think.

Q. Yes, and 16th—you were there working continuously eight days?      A. It must be.

Q. Your first visits over there were merely preliminary trips to look over the ground?

A. To look over the ground.

Q. What is the description of the country there from where you start your ditch, where you seek to divert the water, down to where the ditch is put in, is it hilly, or rolling or nearly level?

A. This part is nearly level through here (indicating) and this part is on a sloping bank, where we would have to lay pipe to carry the water.

Q. Now, how far from the edge of the stream does that sloping bank begin?

A. From the edge of the stream?



(Testimony of Joseph Anderson.)

Q. Yes, from where the water runs—how far back from it—suppose [31—20] the middle of the table is the stream and over here somewhere is the bank, where the ground rises rapidly. Now, how far is that from the stream?

A. On the upper end it comes right down to the stream and then it is a sloping bank clear down, in fact, all the way down the creek.

Q. And that proposed ditch is to be two miles long?     A. Approximately.

Q. About what is the fall?

A. All the way, the average fall, a quarter of an inch to 12 feet.

Q. That would be an inch every 48 feet. Now, is that to be uniform all the way, is the ditch comparatively straight or does it wind a good deal to get grade?     A. Comparatively straight.

Q. It just hugs the hillside all the way and doesn't have to swing around very much?

A. The strike of the hills is very nearly even, they are all the way pretty near even; you have to go along the bench until you get on top.

Q. How much is that ditch away from the stream and if it varies state that—when you first pull away from the stream what distance do you get away from it?

A. In a very short distance; you start the ditch from the stream and strike off toward the hill slope here; it is right on top of the hill slope.

Q. You run close to the stream for a ways?

A. You run close to the stream for a ways here

(Testimony of Joseph Anderson.)

and then strike off about this way—at the most it is about a quarter of a mile away from the farthest point. [32—21]

Q. How far is Brahenburg & Bubb's ditch from the stream?     A. It is closer.

Q. How close to their ditch?

A. Their lower ditch isn't at any place over a thousand feet.

Q. How close to their ditch, their upper ditch, does your proposed ditch run?     A. The intake?

Q. No—it parallels it very nearly, does it not?

A. Yes, sir.

Q. How close does it come to it?

A. In one place on the bank it would be close,—it would be within probably 50 feet of it if it was on a level.

Q. Is it as close as 25 feet in some places?

A. No, I don't think so.

Q. Can you successfully operate that ditch as close as it is to their ditch?

A. I don't see any reason why we can't.

Q. The ground is loose and gravelly?

A. It is gravelly ground, yes.

Q. There is a great deal of seepage in it?

A. No.

Q. Aren't there places where it will break down the banks easily, down toward their ditch?

A. There is one place where it is liable to break through and we would have to either lay pipe or flume, I suppose.

Q. You give the names here of men besides your-

(Testimony of Joseph Anderson.)

self who worked on that ditch and one of them you said, Charley Nawn, merely helped to take up the outfit—where did you get that outfit?

A. At the main camp, at the warehouse. [33—22]

Q. That is on Cache Creek?

A. That is on Cache Creek.

Q. How close was the camp that you occupied while you were doing the work to the ditch itself?

A. Well, it took about twenty minutes.

Q. About a mile and a half—your camp was pitched on Falls Creek? A. Yes, sir.

Q. About a mile and a half from the work?

A. Not that far.

Q. Was it a mile?

A. Less than a mile probably—a mile at the farthest.

Q. How many hours a day did you work?

A. Ten hours, from the time we left camp until we got back—worked nine hours or more.

Q. Now, you had three horses, but you only worked two at a time?

A. We worked two in this way, that there was two working continuously in harness and the other was used to pack feed and supplies from the camp and when a horse got sweaty he was taken out and the other one put in to give him a rest.

Q. You didn't work the plow and scraper at the same time, having only two horses? A. No.

Q. You plowed a while and scraped a while?

A. Yes, sir.



(Testimony of Joseph Anderson.)

Q. It was a railroad scraper?

A. Yes, an ordinary scraper.

Q. Was there much rock in the work you did there?

A. In one place there was a few boulders, none big.

Q. It was dirt and gravel mostly? [34—23]

A. It was dirt and gravel mostly.

Q. Was easily moved? A. Yes.

Q. How many feet did you say you extended that ditch? A. 1600 feet, if I remember right.

Q. Was that of uniform depth?

A. It was of uniform depth except this point here (indicating).

Q. Show us on the map where you started and where you left off in the summer of 1911.

A. Started here and down to here (indicating).

Q. You went to there? A. Yes, sir.

Q. From about there to there? A. Yes.

Q. And you had a continuous ditch, about 1600 feet, where you have indicated on the map?

A. That is right, as near as I can remember.

Q. How deep was that ditch?

A. It was an average of 18 inches on the lower lip.

Q. And how high on the upper lip?

A. There was one place it was about 8 feet, but the most of it was pretty nearly a uniform depth of two feet or so.

Q. How wide was the ditch?

A. Two feet on the bottom.

Q. Isn't it that way all the way through?

(Testimony of Joseph Anderson.)

A. All the way through with the exception of where it dropped off here and wasn't necessary.

Q. Was the ditch completed so you could run water through it most of the way when you left it?  
[35—24]

A. There was one or two places where we would have to do a little pick and shovel work to level off the bottom.

Q. Wasn't there a part of that ditch you claimed you had simply run the plow through and it wasn't over six or eight inches deep?

A. Yes, as I told you, here, this part (indicating).

Q. There wasn't very much work done there?

A. It was just plowed down.

Q. The general depth was two or three feet?

A. Yes, sir.

Q. And the ditch was practically complete so if water had been conducted in, it could have run as far as the ditch was dug?

A. No, there was one or two places that would have to be leveled up; there was ground in the bottom that couldn't be taken out with a horse and scraper and it would have to be taken out with the pick and shovel.

Q. Was it a hard bottom in the ditch all the way?

A. Fairly hard. It had to be loosened up.

Q. What did Victor Carlson do?

A. He held the plow and scraper.

Q. And what did George Winter do?

A. He drove the team.

Q. What did Andy Thomas do?



(Testimony of Joseph Anderson.)

A. He done the cooking and camp work.

Q. Then there was only two men working on the ditch proper?

A. Actually on the ditch, besides myself.

Q. You assisted some, but you were principally superintending the job?

A. Yes, but I worked right along—I was there with nothing else to do and worked right along. [36—25]

Q. So there were three of you practically working on the ditch besides the cook? A. There was.

Q. And the prevailing wages of a man up there is you say \$5.00 a day? A. Yes, sir, and board.

Q. And you figure board worth \$3.00 a day?

A. I did then.

Q. How do you figure that?

A. The cost of freighting in there and the wages.

Q. What are provisions worth in that vicinity of Cache Creek, that is, compared with prices down here on the coast—are they worth twice as much?

A. I should judge more than that.

Q. If you add the freight? A. Yes.

Q. Is the freight the equal of the cost price here on the coast?

A. I don't know what the cost price is here.

Q. You are not familiar with the prices here?

A. No, never bought anything here.

Q. What does it cost by the ton to freight from Seldovia up to Cache Creek, ordinary provisions?

A. I don't know what the freight rate is from Seldovia to Sheep Creek, but I should say approxi-

(Testimony of Joseph Anderson.)

mately \$210 or \$215 a ton.

Q. From Seldovia to Sheep Creek?

A. No—to Cache Creek, I mean.

Q. At that time, in 1911, the steamer picked up the freight at Tyonek and ran up the two rivers, or were they shipping [37—26] from Sheep Creek at that time?

A. They were transferring at Port Graham or Seldovia, I don't remember which.

Q. You don't remember whether it went by Tyonek or Sheep Creek?

A. It went by—I can't say; we bought through the A. C. Company, but I don't know how the transfer was made.

Q. Do you know what the freight rate was from Seldovia or Port Graham to the mouth of Lake Creek? To explain that to the jury, provisions are brought on the water up the Inlet, up the Susitna River, up to the Yentna River to the mouth of Lake Creek? A. Yes, sir.

Q. And then you take them, take your freight right up the creek? A. Yes.

Q. What is the freight rate or was the freight rate at that time from Seldovia or Port Graham to the mouth, entirely up to the mouth of Lake Creek, up to where you—what you call McDougall?

A. I think it was \$25 a ton.

Q. And what does it cost to take provisions from McDougall up to Cache Creek and Dollar Creek?

A. It costs about ten cents a pound—that is the figures that the bookkeeper down below gave me,

(Testimony of Joseph Anderson.)

told me, before I ever went in.

Q. So on those figures you figured that the board of the men was worth \$3.00 a day up there—has there ever been any price paid for boarding men up there?     A. No.

Q. There is nothing you can go by?     [38—27]

A. No.

Q. Now, how do you get at the figure of \$15 a day for the horses?     What is a horse worth up there?

A. I want to correct that statement; I figured it out from notes and I find it was \$13 a day.

Q. What do you feed a horse up there from June to September—don't you turn him out on the grass?

A. Not when we are working him, feed him entirely grain and hay.

Q. But the horses do graze a great deal?

A. When they are not working.

Q. And you figure that a horse is worth \$13 a day?

A. I do.

Q. Was there anybody else using horses around there at that time?     A. No.

Q. You were working those horses continuously for those eight days, from the 9th to the 16th of September?

A. They were working all the time during working hours, that is excepting the one—there was times when one horse wasn't working.

Q. Ordinarily, you had two horses working and three men besides yourself?

A. There were three horses there for that purpose all the time, and we had to have them.



(Testimony of Joseph Anderson.)

Q. Now, then, what wages were you drawing, what salary?     A. I was drawing \$150.

Q. That is \$5 a day?

A. \$5 a day, that is, not during the mining season, but continuously, at any time, whether I am working or not.     [39—28]

Q. Now, let us see how you figure this—you figure that there were five men working there, counting the cook?     A. No, four.

Q. Four, including the cook?

A. Four including the cook.

Q. And then yourself, you would make five—or was it three men besides yourself?

A. Three men besides myself.

Q. There were just four of you working there?

A. There were four of us working there, outside of the time I put in for Nawn, what he done to benefit the ground, that is, in getting things ready.

Q. But you have in your figures as to the cost of board, the cost of everything else—that is, you have figured the cost of getting everything into the camp—you figure it is worth \$3 a day to board a man on Dollar Creek?     A. I do.

Q. And you add to the credit you claim for this work the cost of getting in the outfit—you are counting it twice, then, are you not?     A. I am not.

Q. If you figure grub is worth \$3 a day on Dollar Creek, then you are lumping off the total cost of transferring it in there?

A. I am figuring what it cost at the main camp.

Q. It is worth a little more at Dollar Creek?



(Testimony of Joseph Anderson.)

A. It would be, but I never figured it any more.

Q. About working these claims down here (indicating)—you have been up there since 1905?

A. I have. [40—29]

Q. And you and George Eberhardt located all those claims? A. We just located two.

Q. You are very familiar with Dollar Creek all the way down? A. I am.

Q. Just describe to the jury this claim Number 1 above—I mean describe the surface of it. Is it nearly level?

A. The channel here—there was a channel which would average about 60 feet wide at the bottom on this side; all the way down the claim here is a low bar about from four to eight feet high, that is about—it would run from 50 to 150 feet wide and then the bench runs up, a sloping bench.

Q. That claim is 660 feet wide and 1320 feet long?

A. Yes, sir.

Q. You say the river channel, the creek channel, is 60 feet wide? That is not all covered with water?

A. No, the gravel.

Q. And the channel in which the stream runs is 60 feet wide? A. Yes, sir.

Q. And I believe you told Judge Lyons that the gravel or this deposit of tailings you complain of was possibly three feet deep? A. Yes.

Q. Now, have you prospected and worked on the benches to find what the deposit of gravel is, the depth?

A. Not to any great extent. On this side the rim

(Testimony of Joseph Anderson.)

is up about—it is 100 feet above the present creek channel down here.

Q. Then the benches and the bed of the creek which may contain pay is about 200 feet wide?

A. Yes, and it may be more in this bench, on this side—that has never been prospected—it might be somewhere from two to [41—30] three hundred feet. These claims like the discovery and Number 1 below discovery can be considered a box canyon—right in here.

Q. How about one below?

A. The channel is narrow, with some low bars in it.

Q. It is mostly a box canyon, all the way through those two claims? A. No, not this one.

Q. Where does the box canyon end?

A. Right there (indicating).

Q. There is only one claim in the canyon?

A. That is all.

Q. Isn't there pretty steep walls through a good part of that?

A. There are steep walls, but the canyon itself is wide.

Q. Where does this ditch come in, where you have indicated it by the dotted line? Is it to run into the middle of the Boston Association claim?

A. No, sir; that is to indicate it can be run down there without any trouble.

Q. The lower terminus has never been fixed?

A. The lower terminus has never been fixed, no.

Q. Is there any pay in the discovery claim?

A. Yes, sir.

(Testimony of Joseph Anderson.)

Q. Who located that, you or Eberhardt?

A. Eberhardt.

Q. You and George were partners at that time?

A. We were partners at that time.

Q. And one or the other located one below?

A. No, we bought one below.

Q. Who located that? [42—31]

A. Chris Hammerschmidt.

Q. Did you ever do any work on the discovery?

A. Yes, sir.

Q. Whereabouts with reference to the canyon claim?

A. That is the canyon claim—one-third of the way up to the lower rim.

Q. How much did you work on that?

A. There are three good-sized cuts run in it; besides what has been done the last two years.

Q. Has there ever been anything taken out of that to pay for the work on discovery? A. There was.

Q. When? A. Every time it has been worked.

Q. How can you work it?

A. Just pick and shovel, ground sluiced off.

Q. Did you work it a while yourself?

A. I did—Eberhardt and I.

Q. Did you take much money out of it?

A. We took—well, it averaged about, if I remember rightly, about \$12 a day.

Q. In what years?

A. That was in 1906 and 7 and 8 and then it was worked on a lay after that.

Q. What work has been done on the discovery,



(Testimony of Joseph Anderson.)

how has that been worked, the last three or four years—by lays?     A. By lays, the last two years.

Q. As a matter of fact, has anybody ever made anything out of that except the Harper Brothers, who one year took \$800 out [43—32] of the bar in a short time—isn't that the only time it has paid?

A. No, it is not; it paid when I worked it.

Q. It has not been worked for the last few years except on small lays, has it?

A. Whether work was done there during the time Cameron was manager, I don't know—I was not there.

Q. Now, your intention was to start way down below there and work up, was it?     A. It was.

Q. Did you have a definite policy as to where you would start?     A. Yes.

Q. Where?

A. The intention was to start at that time with a flume down in here (indicating), down in discovery and run it through the bottom of the creek, slough—everything in with the pipe, the giants, right into the flume, that is, cut down to bedrock and as a natural grade can be handled very cheaply that way, run everything into the flume, let it come down through and clean the bottom up through and then we can get into the benches without covering up what we consider good ground.

Q. The first work you ever did on that supposed ditch was September, 1911?     A. It was, yes.

Q. Did you see Brahenburg and Bubb around there while you were doing the work?     A. I did.



(Testimony of Joseph Anderson.)

Q. Did they come over and talk to you about it?

A. They did. [44—33]

Q. What conversation took place between you, if you remember?

A. I think Mr. Braheburg asked me if it was my intention to take their water away from them, and I told them I didn't intend to interfere with any rights they had at that time.

Q. To refresh your memory I will ask you if you did not tell Brahenburg and Bubb that you didn't know whether this would amount to anything, that you simply did it for assessment work, to hold the claims? A. I did not.

Q. You made no such statement at all?

A. I made no such statement at all.

Q. All the work you did for assessment work on those claims, to hold those claims, was this work you did on the ditch? A. It was.

Q. And you figured that as worth \$600?

A. I did.

Q. Who owns the ground where your ditch runs, is it public land or is it located claims?

Judge LYONS.—We object to that; that has nothing to do with this case, that is not at issue.

Objection sustained.

Q. Was there any further conversation than you have indicated took place between you and Brahenburg and Bubb at that time?

A. I think it was at the same time that Brahenburg asked me for a lay on the ground.

Q. Which ground? A. Number 1 above.

(Deposition of Malcolm M. McDougall.)

Cache Creek in the Territory of Alaska, you may now state how many placer claims are owned by said company and how long the plaintiff has [47—36] owned said claims.

Mr. RITCHIE.—We object to that as irrelevant because the question of how many claims is not pertinent to this issue—the question must be as to the six claims that this ditch as originally to be constructed is to benefit.

Objection overruled. Defendant allowed an exception.

A. The company owns in the Yentna Mining District either on Cache Creek or tributaries of that creek quite a number of claims.

Int. No. 7. How much money has been spent by the plaintiff in acquiring said mining claims and developing the same?

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

Int. No. 8. State, if you know, if said claims have been operated by the plaintiff at a profit or a loss.

Mr. RITCHIE.—Same objection.

Objection sustained. Plaintiff allowed an exception.

Int. No. 9. Have you ever been on said property and in what years?

A. Yes, I have been in that district twice, once in 1909 and once in 1910.

Int. No. 10. Do you know of any claims which are

(Deposition of Malcolm M. McDougall.)

owned by the plaintiff on a stream called Dollar Creek, in the vicinity of Cache Creek, and if you do, you may name them?

A. Personally, I was never on any claim on Dollar Creek and what I know of those claims is but evidence of record title and hearsay.

Int. No. 11. State, if you know, whether it is the plan of your company to operate the Dollar Creek claims by means of hydraulic pressure or otherwise.  
[48—37]

A. Yes, I know that it is the intention to operate by hydraulic pressure.

Int. No. 12. State, if you know, if your company has planned to put in a ditch or ditches for the purpose of operating the Dollar Creek claims by means of hydraulic power and when, if you know, were such plans first adopted.      A. Yes.

Int. No. 13. State, if you know, if the finances of your company enabled you to install a hydraulic plant on Dollar Creek up to this time or otherwise.

Mr. RITCHIE.—We object to that as irrelevant and immaterial.

Judge LYONS.—My intention is to show the good faith of the company.

Objection sustained. Plaintiff allowed an exception.

Int. No. 14. Is the stock in the plaintiff company owned by a large number of stockholders, and, if you know, state approximately the number.

Mr. RITCHIE.—We object to that as irrelevant and immaterial.



(Deposition of Malcolm M. McDougall.)

built by the company from McDougall to the vicinity of these placer claims.

Mr. RITCHIE.—We object to that as irrelevant and immaterial for the reasons stated heretofore.

By the COURT.—The objection will be overruled, for the same reason that I admitted the other question.

Defendant allowed an exception.

A. Yes.

Int. No. 22. State, if you know, what this road cost.

Mr. RITCHIE.—Same objection.

Objection sustained. Plaintiff allowed an exception.

Int. No. 23. Has your company taken horses into this property on Cache Creek from Seattle and the southern coast of Alaska? A. Yes.

Int. No. 24. What is the distance from the coast of Alaska to those mining claims?

A. About one hundred miles.

Mr. RITCHIE.—I move to strike the answer as not having any bearing on the issues in this action.

Motion denied. Defendant allowed an exception.

Q. Do you know the cost of hay, etc.—I will not read the remaining questions, as they come within your Honor's ruling. [51—40]

#### Cross-interrogatories.

Q. No. 1. What is the length of roads constructed by the Cache Creek Mining Company in the Cache Creek district, and where are their termini?

Answer to Cross-interrogatory No. 1.

They commenced at McDougall and terminated up



(Deposition of Malcolm M. McDougall.)

Cache Creek at a point near or at the intersection of Nugget Creek, making about sixty-five miles.

Q. No. 2. Were those roads built by the company alone for its own purposes? If not, who else was interested and what contributions, if any, did other persons make toward their construction?

Answer to Cross-interrogatory No. 2.

They were built by the company alone for its own purposes and I knew of no one else contributing thereto or interested therein, except the bridge constructed by the Government heretofore mentioned.

[52—41]

Judge LYONS.—I will now read the deposition of R. J. Cameron.

**[Deposition of R. J. Cameron, for Plaintiff.]**

The said R. J. CAMERON being first duly sworn to tell the truth, the whole truth and nothing but the truth, in answer to the interrogatories testified as follows:

Int. No. 1. State your name, age, residence and occupation.

A. R. J. Cameron; fifty years; Seattle, Washington; my active life has been that of a lumberman; recent years I have not been actively engaged in business.

Int. No. 2. If you hold an office in the plaintiff corporation, please state what office it is.

A. Yes, I am secretary and treasurer of the plaintiff company.

Int. No. 3. Do you know the defendant, Henry Brahenburg, and if you do, state how long you have

(Deposition of R. J. Cameron.)

known him.      **A. Yes, only casually.**

Int. No. 4. State if you know where the property of the plaintiff company is situated and what does it consist of.

A. Yes, it is claim Number 1 above on Dollar Creek, a tributary of Cache Creek in the Yentna Mining District of Alaska; it consists of ordinary placer claims that have been regularly located, and described in the complaint on file.

Int. No. 5. If you state that the property of this company is situated in the vicinity of Cache Creek in the Territory of Alaska, then state if you ever saw said property and in what years.

A. Yes, in the years 1910 and 1911.

Int. No. 6. State, if you know, of a certain stream named Dollar Creek in the vicinity of Cache Creek, and if you do, you may state if the plaintiff company owns any mining claims on Dollar Creek. [53—42]

A. Yes.

Int. No. 7. State, if you know, of a certain mining claim on Dollar Creek known as Number One above, and if you know, state whether or not Dollar Creek flows through this claim.      A. Yes.

Int. No. 8. State, if you know, who is the owner of the next claim and all the claims on Dollar Creek above Number One above on Dollar.

A. I only know the claim immediately above Claim Number One above, which is reputed to be owned by Brahenburg and Bub.

Int. No. 9. Have you ever been the manager of the plaintiff company, and if so, in what year or years?

(Deposition of R. J. Cameron.)

A. Yes, in the year 1911.

Int. No. 10. State if you were on the property of the company in the year 1911, and if you were, state during what months.

A. Yes, during the months of June, July and August.

Int. No. 11. Do you know Mr. Joseph Anderson and if you state that you do, then state if you know what position he now holds with reference to the plaintiff company and how long has he held such position.

A. Yes, he now holds the position of superintendent and manager in Alaska and he has held that position since 1911.

Int. No. 12. State, if you know, how many placer claims the plaintiff company owns on Dollar Creek.

A. About nineteen. (On the basis that twenty acres constitutes a claim—some of ours have been staked in groups.)

Int. No. 13. State if you have ever talked over with Mr. Anderson on the question of the most economic way of mining the company's claims on Dollar Creek.

Mr. RITCHIE.—We object to conversations between Mr. Cameron and Mr. Anderson. [54—43]

Objection sustained as incompetent and immaterial. Plaintiff allowed an exception.

Int. No. 14. If yourself and Mr. Anderson talked this matter over and you decided on a certain way for mining said claims, you will please state if that way was by means of hydraulic pressure.



(Deposition of R. J. Cameron.)

A. Yes, it was.

Int. No. 15. What is the distance, if you know, from the claim known as Number One above on Dollar Creek to the source of Dollar Creek?

A. I do not know.

Int. No. 16. While you were the manager of said plaintiff company, if you testify that you have been its manager, then state what the result of your talk with Mr. Anderson was with reference to building a ditch from the head of Dollar Creek, so that the same could be used for generating hydraulic power for the purpose of washing gravel on Number One above on Dollar Creek and other claims which the plaintiff company owns on the same stream.

A. We made an investigation and talked the matter over at great length and at last decided that it was feasible, and I instructed him to dig a ditch and take the water from Dollar Creek high enough above to wash the gravel of all our claims by hydraulic pressure.

Int. No. 17. If you determined to build said ditch while acting as the manager of said company, please state the length of the same approximately, together with its cost and what amount of money, if you know, had been expended by the company in building the same prior to the first day of August, 1912.  
[55—44]

A. I left those details to Anderson and could not of my own knowledge give a definite answer.

Int. No. 18. State, if you know, when the work was first commenced on this ditch.



(Deposition of R. J. Cameron.)

A. I think in 1911, under Anderson.

Int. No. 19. Do you know the firm of Brahenburg & Bub?     A. Only casually.

Int. No. 20. How long have you known Mr. Brahenburg and Mr. Bub?

A. I met them first in 1911.

Int. No. 21. Do you know whether or not they or either of them was the owner of any claims on Dollar Creek and how many?

A. They were the reputed owners of the adjoining claim immediately above Number One claim above on Cache Creek.

Int. No. 22. If you state that they are the owners of mining claims on Dollar Creek, then you may state if you ever saw them mining said claims and whether said mining operations were carried on by means of hydraulic power or otherwise.

A. Yes, they were operating some by means of hydraulic power.

Int. No. 23. If you state that the mining operations of Brahenburg and Bub were carried on by means of hydraulic power, then you may state where they are getting water for the use of the same.

A. They got the water out of Dollar Creek by the use of a ditch.

Int. No. 24. If you state that the water is carried in a ditch then state what is the length of said ditch and where is its source.

Mr. RITCHIE.—I don't think this is pertinent. It was stipulated that these depositions could be used

(Deposition of R. J. Cameron.)

in both cases. We object to it as irrelevant. [56—45]

Objection sustained. Plaintiff allowed an exception.

Int. No. 25. State, if you know, how long they have been using said ditch and if they were using the same in August, 1911.

Mr. RITCHIE.—We object to that as irrelevant—it is pertinent to the other case but not to this.

Objection sustained. Plaintiff allowed an exception.

Int. No. 26. If you testify that a ditch has been built by the firm of Brahenburg and Bub and that one is being built by the plaintiff in this action, then state how far such ditches are from the main stream of Dollar Creek.

A. I could not say definitely; they were on the benches of Dollar Creek.

Int. No. 27. State if such ditches run nearly parallel to each other or otherwise.

A. Yes, they ran parallel or at least in the same general direction.

Int. No. 28. State, if you know, what becomes of the washed gravel in the flumes of Brahenburg and Bub, if you have seen such flumes and know of the hydraulic operations conducted by said firm.

Mr. RITCHIE.—We object to that as irrelevant—that is for the other case.

Objection sustained. Plaintiff allowed an exception.

Judge LYONS.—That is true of the remaining

(Deposition of R. J. Cameron.)

questions; they would be for the other case too and I will not read them.

Cross-interrogatories.

Q. No. 1. When you decided to start digging a ditch from Dollar Creek to carry water for hydraulic mining, on what claims did you expect to use the water? In what year and month [57—46] did you make this plan for the company, and did you not then know that Brahenburg and Bub were already using by prior right all the water in Dollar Creek except in flood seasons?

Answer to Cross-interrogatory No. 1.

On Claim Number One above and on all our adjoining claims below Claim Number One above to which the same might be appropriated as stated in the direct interrogatories. That was about in the year 1911 and I do know that Brahenburg and Bub were not already using all of the water in Dollar Creek for their own purposes.

Q. No. 2. What kind of a plant were Brahenburg and Bub using when you were on their property? Describe it and its capacity.

Answer to Cross-interrogatory No. 2.

As I remember, it was a pressure hose with two small nozzles.

Q. No. 3.—

Mr. RITCHIE.—That is for the other case.

Judge LYONS.—Yes, sir.

Plaintiff rests. [58—47]



(Testimony of Henry Brahenburg.)

had to start digging a ditch there and taking our water.

Q. Relate the conversation. Just state what was said, not your reasons for asking but just what you said and what [60—49] Anderson said. Was there anybody present when you first went up besides you two?

A. No, I and Bub, my partner, the first time; the second time there was several parties present.

Q. In this first conversation state what each of you said.

A. I asked him what right he had to dig his ditch and where he was going to get his water—I said it looked like he was trying to put our property in litigation by digging a ditch and taking water, when we already had two ditches, one completed and one-half completed and we didn't have half enough water for ourselves and there was no way for me to stop them without going to court.

Q. What did Anderson say, if anything?

A. Well, he said he was just doing it, doing assessment work; he said he thought they might use it some time and I asked him where he was going to get his water and he said he didn't know.

Q. At that time were you and Bub using all of the water in Dollar Creek?

A. We were using it except at high water; yes.

Judge LYONS.—This line of questions seems to me to be incompetent and I object to them.

Objection sustained. Defendant allowed an exception.



(Testimony of Henry Brahenburg.)

Q. Now, did you see that work from time to time when it was being done?

A. I would see it every day, yes. We were above timber line and everything was in plain sight.

Q. How high is that country around there, about what is the elevation?

A. Three thousand or something like that, I guess; close to [61—50] three thousand.

Q. Did you see the work when they finished it?

A. Yes.

Q. How many men did you see working there? You say you were there every day, in 1911?

A. There was two besides Anderson himself on the work.

Q. Who were those men?

A. George Winter and Victor Carlson.

Q. Did you know Andy Thomas? A. Yes.

Q. What did Andy Thomas do, if you saw him do anything?

A. I didn't happen to see him; they were a mile or a mile and a half on Falls Creek; they had their camp over there.

Q. You saw the work when it was finished. Describe what that work was like when they quit and pulled off their men and horses.

A. As near as I can describe it, it was just—

Q. Go to the plat and indicate to the jury the nature of the work and the length of it as you remember it.

A. Well, there was about fourteen or fifteen hundred feet here; as near as I can describe it, it was

(Testimony of Henry Brahenburg.)

just plowed out, no part of it looked like a ditch, no part of it would carry water, and it would cost more to complete it than they had already done.

Q. How deep was that ditch from place to place? If it was of varying depths, describe it as you go along.

A. Half of it ain't plowed out and the other half I don't think would average more than six or ten inches; there is places where it is two feet deep, that is holes.

Q. What would you say was the average depth of the digging in [62—51] that ditch?

A. Six or eight or ten inches.

Q. And the average width?

A. Well, two feet; something like that, I guess.

Q. Now, Mr. Anderson spoke of the upper lip being a much deeper cut than the lower one; now, how deep were any of the excavations on the upper side of that ditch?

A. One or two places were three or four feet, three or four or five feet, something like that, a steep point; the upper end of this is all steep bank, there is no lip to it, everything is rolled down, and our ditch is just below here (indicating), about an elevation of 25 feet between the two ditches; our ditch runs clean up into the creek, it is about two thousand feet up to the head of that ditch; that is not completed at all, not even a survey of it.

Q. What kind of a bottom did that ditch have?

A. They didn't go through the loam. There is about two or three feet of loam and there would be

(Testimony of Henry Brahenburg.)

gravel under that and some glacier clay.

Q. Did he have a solid bottom to any extent?

A. No.

Q. What was on the bottom?

A. Loam and one or two places they struck a little fine gravel.

Q. No clay?

A. No, I don't believe there was.

Q. State what work was done there besides the plowing and scraping and how much scraping was done, if you know.

A. There was very little; I never seen over two or three hours scraping in all that time.

Q. How much time did you spend around the work? [63—52]      A. How is that?

Q. How much time did you spend around the work while they were doing it?

A. I never spent much time right at the work, only a few minutes at a time, but I was within half a mile or quarter of a mile of the work all the time and could see them all through the day.

Q. And you say you visited it every day, came up to the work every day?

A. Yes, that was to go up on our ditches, taking care of our ditches.

Q. Have you any photographs of that ditch as it was in 1911?      A. Yes, sir. I gave them to you.

Q. Pick out of there any photographs which show the ditch as it was when they finished the work in 1911, that will show any part of it.

A. This is one at the lower end of it when they



(Testimony of Henry Brahenburg.)

finished, when they left off. Here is one that shows the biggest cut on it.

Q. How much of the length of it does this show?

A. About three or four hundred feet.

Mr. RITCHIE.—We will offer these as exhibits.

They are admitted and marked Defendant's Exhibits One, Two and Three.

Q. How many horses did they have working there?

A. I never see but two work at the same time. There were three horses there but I never see but two work.

Q. They had two on the plow and two on the scraper? A. Turn about; yes.

Q. They couldn't work a plow and scraper at the same time? [64—53] A. Yes, they could.

Q. Do you know what the work of a horse is worth by the day up there? Has there been any great number of horses used up there, so you can fix the value of them?

A. Yes, there has been horses up there; they figure them the same as a man's wages and add on the feed; there were horses running up there, there was a pack train running there all summer and you could get a horse for ten dollars a day through the summer season.

Q. That would cover his work and his keep too?

A. Yes, sir.

Q. How do they feed horses there in the summer time?

A. They feed them with grain when they are working.



(Testimony of Henry Brahenburg.)

Q. And turn them out to graze when they are not working?     A. Yes.

Q. Were you over at the Falls Creek camp when they were working up there?

A. Not while they were working there, no, not while they had their camp there—I was not there.

Q. These photographs have been offered in evidence. Now, take this one—take one at a time, and explain to the jury just what part of the ditch they show and tell them what length; take them in their order, 1, 2 and 3—take 1 first and tell the jury what part of the ditch that shows and to what length.

A. That is about 200 feet at the upper end, where they left off.

Q. That is the upper end of the ditch, about where they start?

A. Yes. About 2,000 feet from the head here.

Q. This shows about 200 feet in linear extent of the ditch at the upper end? [65—54]     A. Yes.

Q. And what does the second one show?

A. That shows about 300 feet of the lower end.

Q. And what does this show—3?

A. That shows something like two or three hundred feet about the middle.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Judge LYONS.)

Q. Did you ever hire any horses?

A. Yes, we have.

Q. From whom?

A. We hired some horses from the Cache Creek

(Testimony of Henry Brahenburg.)

Mining Co. at one time to do our freighting.

Q. What did you pay for those horses?

A. We gave them \$100 a day for the outfit—they had seven horses and four men.

Q. Six or seven horses?

A. Seven horses for four days—I think we had them for 8½ days—there was, I think, four days we had seven horses and the rest of the time we had six horses.

Q. Why didn't you have the seven for all the time?

A. One of the horses got sick, I think, something like that.

Q. You say that you were up around this ditch that was dug by the company every day during the month of September?      A. Yes, every day.

Q. What were you doing there?

A. Taking care of our ditch.

Q. Taking care of your ditch?

A. We were using our ditch and we had to go up and look after [66—55] it every day and high water we have to have a man on it all the time. This was the fall of the year and we were closing down and we looked after it ourselves; one of us would be up on the ditch two or three times a day and then one of our ditches was not complete and we were working on that off and on at times.

Q. Was Mr. Anderson working there?

A. He was always around—no, he was not working there.

Q. Never works at all?

A. I never see him work.

(Testimony of Henry Brahenburg.)

Q. You stayed there all day, did you, on their property?

A. No—I was generally around; we were operating too.

Q. This was the month of September?

A. Some time in September, yes—I don't remember exactly the dates.

Q. You were simply around at that time watching the operations of the other company?

A. No, not particularly.

Q. You say you were there every day?

A. We were there every day where we could see them—we could see them right from our works without going up there; we didn't have to go up where they were working.

Q. Now, if there was more work done on this ditch of the plaintiff company—can't it be made into a good ditch by more work?

A. Yes—a fellow could start a new one alongside of it and make it a great deal cheaper than the one already started.

Q. Why?     A. Well, several reasons. [67—56]

Q. If you know that that is true, answer the question. Why?

A. Well, they plowed out a lot of ground there and they have—well, if they could run water uphill they probably could dig the ditch all right; something like that.

Q. That is the best answer you can give to my question? I asked you why you stated to this jury that another ditch could be made cheaper alongside



(Testimony of Henry Brahenburg.)

of this one than this one could be finished up.

A. I have dug two ditches right alongside of it there and I didn't use a horse; I dug it by hand and with the conditions of that ground it could be dug cheaper by hand, a ditch can, than it can with horses.

Q. Tell the jury why.

A. Because it is on a sidehill and all the material they plow out of the ditch rolls down the hill; if you dig it by hand you pile that up—you build the ditch up.

Q. Suppose you take the material out of that ditch by hand, where would you throw it?

A. You place it, you build a levee up.

Q. Can't you build a levee up with a plow, partially at least?

A. You are on a steep sidehill and everything rolls downhill.

Q. Can't you go along with your shovels and fix that up afterwards?

A. Yes, you can dig it by hand, yes—then you are digging.

Q. Why did they bring that scraper and plow over there?

A. Because they had a lot of horses there and that was the cheapest way for them to do the assessment work—that was the only way that I could figure it out.

Q. Did you have horses when you dug your ditch? A. I had a horse; yes. [68—57]

Q. Who owned it? A. Me and my partner.

Q. Who were these parties that owned these



(Testimony of Henry Brahenburg.)

horses that did that freighting over in that country you are talking about?     A. The horses we hired?

Q. Yes.     A. The Cache Creek Mining Company.

Q. You testified to some other horses being used in that country—who owned those horses?

A. We owned one.

Q. How many more horses were there in the country for hire?

A. There were horses in that country before the Cache Creek Mining Co. came up there, right in the Cache Creek country.

Q. Who owned the horses at the time you say they were there?     A. A man named Bill Hughes.

Q. How many horses did Bill Hughes own?

A. I forget; he had six or eight, something like that; I don't know the number; he packed freight in there, I think, in 1905 or 1906.

Q. That was before the Cache Creek Mining Co. was in the country at all?     A. Yes.

Q. What other horses were in that country since the Cache Creek Mining Co. people came in?

A. There was quite a few horses in there—we had one horse at that time.

Q. You don't know whether anybody that was freighting in there for hire at all since the Cache Creek Mining Co. came in there?

A. Yes, there was a man named Sam Graham had a couple of [69—58] horses and was freighting in there; I don't know that he came clear to Cache Creek but there was two or three outfits besides the Cache Creek Mining Co. outfit that freighted into

(Testimony of Henry Brahenburg.)

the Cache Creek country.

Q. Who were they?

A. Bill Hughes, Sam Graham and myself.

Q. Hughes wasn't there before the Cache Creek Mining Co. came there?      A. No, I believe not.

Q. When did you take these photographs?

A. They were taken late this last fall.

Q. Who took them?      A. The Harper Brothers.

Q. Did you ever hire any horses in there for ten dollars a day?

A. Those are the only horses I ever hired, what we hired from the Cache Creek Mining Co., and I never figured out what they really did come to a day; it was \$100 for seven horses for four days and six horses for four days and a half, with a crew of four men, harness, feed and everything thrown in—it was \$100 for the outfit.

Q. And one of those horses was not working?

A. There was seven horses worked four days and six horses four days and a half.

Q. What were the seven horses doing?

A. Hauling freight.

Q. What were they hauling freight on?

A. Double-enders.

Q. How many sleds did you have?

A. Well, they had seven sleds,—some had trailers and some were [70—59] single sleds, I don't know exactly—each horse had a sled.

Q. Do you mean to tell this jury that you had seven sleds?

(Testimony of Henry Brahenburg.)

A. Each horse had a sled; there were seven sleds, yes.

Q. Now, you have built a ditch over there along the same stream, have you not, and taken water out of Dollar Creek?

A. Yes, we built two ditches and several small ones; we are using all the water of Dollar Creek and have started another ditch out of Falls Creek and haven't half enough water the way it is.

Q. You haven't half enough water the way it is?

A. No; our ditches are fixed to carry all the water in Dollar Creek except in extreme high water, probably two or three days in the season; outside of that we are using all the water and have been using it for the last two years, that is, all of it; we have been using it for the last four years.

Q. When did you locate your claims in there?

A. The summer of 1910 what we located and the other claims we bought.

Q. Did you see George Winters there in September, 1911?

A. He was working for the Cache Creek Mining Co. at that time and afterwards went to work for us.

Q. He was working for the Cache Creek Mining Co.?     A. At that time, yes, 1911.

Q. What was he doing?

A. He was driving the team.

Q. What was the team doing?

A. Plowing the furrows in that ditch.

Q. Do you know Victor Carlson?     A. Yes, sir.

Q. What was he doing?     [71—60]



(Testimony of Henry Brahenburg.)

A. I believe he was holding the scraper the best part of the time, and holding the plow when they were plowing.

Q. They were not sitting around—you didn't see any of them sitting around and not doing anything?

A. Well, no, hardly—I couldn't see that they were sitting around.

Q. They were working as hard as you were, watching them?      A. They were putting in time.

Q. What were you doing? Watching the operations of the company?

A. Watching the operations of the company and putting in time also.

Q. Do you know Andy Thomas?      A. Yes, sir.

Q. Was he working there at that time?

A. I believe he was doing their cooking over on Falls Creek.

Judge LYONS.—That will be all.

(By Mr. RITCHIE.)

Q. You stated a while ago in answer to Judge Lyons' question that your own work compelled you to go up along the ditch every day?

A. Yes, it does, two or three times a day and sometimes it keeps a man there all the time.

Q. And in going along that ditch you came how close to their work?

A. Their ditch is about 25 feet higher up than our ditch—there are places that it ain't 30 feet of a climb to their ditch.

Q. So that in going up and down your ditch you pass them every day?      A. Yes, sir. [72—61]



(Testimony of Henry Brahenburg.)

Q. Now, this time that you hired this outfit from the Cache Creek Mining Co.—when was that?

A. That was in the fall of 1911, I believe.

Q. About the same time?      A. Yes, sir.

Q. What month—after the snow was on?

A. December or January.

Q. As you were using sleds it was necessarily after the snow came?      A. Yes, I think it was January.

Q. You hired seven horses from them and seven sleds and harness and four men and the feed for the horses—they furnished the feed for the horses?

A. Yes, sir, for the whole outfit.

Q. They furnished everything?

A. They furnished everything.

Q. Wages and board for the men and everything?

A. Yes, sir.

Q. And you paid them \$100 a day?      A. Yes, sir.

Q. That is all?      A. That is all.

Q. Are horses worth more in summer or winter in that country?      A. Just about the same, I guess.

Q. They have to be fed wholly on hay and grain in winter?      A. Yes, sir.

Q. Whether they are working or not?

A. Whether they are working or not they have got to be fed all through the winter; if they are working they have got to be fed more than if they were not working. [73—62]

Q. Is there good grass in summer that they can be turned out on if they are not working?

A. Yes, sir.

(Testimony of Henry Brahenburg.)

(By Judge LYONS.)

Q. Do you mean to say that horses can work on grass up in this country?     A. No, sir.

Q. You don't mean to say that?     A. No, sir.

Q. Did you ever work for the Cache Creek Mining Co.?     A. Yes, sir.

Q. When?

A. The spring of 1910 the first time and the spring of 1911 I worked for them.

Q. How long did you work for them altogether?

A. Five or six months, something like that, I guess, all told.

Q. When did you quit working for them?

A. The first time I quit was along in the middle of the summer of 1910, the first day of July, I believe it was; the other time I quit, I think it was getting along the first of June, in the spring.

Q. Of what year?     A. 1911, I believe.

Q. Then you were not working on your claims all the time?

A. My partner was, yes, and he had men working in my place.

(By Mr. RITCHIE.)

Q. What were the going wages for miners and other men doing such work as that, working on this ditch, at the time that was done? [74—63]

A. They were paying \$100 a month then, that is, the Cache Creek Mining Company was.

Q. One hundred dollars a month and board?

A. Yes, sir.

(Testimony of Henry Brahenburg.)

Q. How many days did they work a week—six or seven?

A. Working thirty days in the month, I guess—put in the whole month, I think.

(By Judge LYONS.)

Q. What is board worth up there?

A. We always figure about \$2.00 a day.

Q. How do you figure that?

A. Well, the cost of grub, the cost of freighting, getting it in there and that is what the general camp figures it at, at \$7 a day to the man; that is, \$5 a day and allow him \$2 a day for board; that is the general rule of the camp. We never figured it out closely, but I think that is what it cost us, what little operations we done.

Witness excused. [75—64]

**[Testimony of Louis Bub, for Defendant.]**

LOUIS BUB, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?      A. Louis Bub.

Q. What business relations, if any, exist between yourself and the defendant here?

A. We are partners.

Q. You are partners on some property on Dollar Creek in the Yentna country?      A. Yes, sir.

Q. How long have you lived in that country?

A. Almost nine years.

Q. What have you been engaged in up there?



(Testimony of Louis Bub.)

A. Mining.

Q. What year did you go over there?

A. The winter of 1905.

Q. And have been prospecting and mining there ever since?     A. Yes, sir.

Q. When did you become associated with Brahenburg?     A. I think it was about 1908.

Q. You know Mr. Anderson?     A. Yes.

Q. Were you in the vicinity in September, 1911, when Anderson and some men did some ditch work along Dollar Creek?     A. I was.

Q. Did you see that work?     A. Yes, sir.

Q. How often?

A. I would go by it every day. [76—65]

Q. Why did you go by it every day?

A. We had a ditch below there and we used to go up there to see if our ditch was all right, and we were digging another ditch above at the time and the trail to get to it was right by where the company was working.

Q. How many men were working on that ditch, digging?     A. Two, I see.

Q. Who were they?

A. George Winters and Victor Carlson.

Q. Was Anderson there?     A. Yes, sir.

Q. Was he working with the men?

A. I never see him working. I have seen him surveying, that is, he had a tripod and was surveying the ditch.

Q. Superintending the work?     A. Yes, sir.

Q. How many horses did they have?



(Testimony of Louis Bub.)

A. Three horses were there.

Q. How many worked at a time?

A. Two,—that is all I ever see.

Q. Did you have any talk with Anderson or hear any between him and Brahenburg in regard to this?

A. Yes, sir.

Q. State briefly what was said.

A. The first time they started the ditch my partner and I went up and asked him what he was doing; he said he figured on digging a ditch and we told him, he surely knows there isn't water enough in the creek for our purpose and he says he knows, but he says he got the orders to dig this ditch for the assessment work but he didn't know whether he would [77—66] ever use it or not.

Q. Did you see that ditch after it was completed, that is, the work they did on the ditch?

A. I didn't see no ditch.

Q. You saw the work after it was finished, after they pulled away from there? A. Yes.

Q. Just get up to the plat there and describe to the jury beginning at the upper end, the nature of the work, as you would describe the surface of the ground of any country that you wanted to describe.

A. This is the ditch they started in 1911—it is about 1,600 feet.

Q. What is that ditch like at the upper end?

A. Well, at the upper end there was one place for about 30 feet it was about two feet deep, probably four feet wide; and there was a stretch on the side of that that was ten inches deep; that ditch for 400

(Testimony of Louis Bub.)

feet at the upper end was running uphill. When I saw that I surveyed it with a level, surveyed it myself and know it was surveyed uphill and would have to be lowered two feet before the water would run.

Q. The question is how much digging they actually did—what was the average depth and width of the digging they did there?

A. From one end to the other probably 8 inches deep and two feet wide.

Q. What was the deepest part?

A. About two feet deep.

Q. Where was that? A. On the upper end.

Q. How much of it was 2 feet deep? [78—67]

A. About 30 feet, probably 40.

Q. How did they leave the bottom of those diggings? Was it down to clay or anything, was it a hard bottom, so it would carry water?

A. In one place in this hole where they got two feet they struck gravel and the rest of it it was all loam.

Q. What was the appearance of the ditch at the place where it was shallowest? A. Why, loam.

Q. The bottom of it was loam you say?

A. Yes, sir.

Q. And what was the depth and width of the shallowest place?

A. Probably twenty inches, two feet wide, six inches deep—just the depth of what you can go along and plow out with one furrow of the plow.

Q. Did they scrape the entire length of it?

(Testimony of Louis Bub.)

A. No, sir.

Q. How much of it did they not scrape?

A. At the upper end there was a stretch, we will say probably 300 feet that there was just simply furrows plowed and they are laying there yet.

Q. No shoveling was ever done on it?

A. No, sir. And on the lower end was a stretch for 500 feet that there was just two furrows plowed—one furrow would fall out and the next furrow would fall on that, and that was all that was done.

Q. What were the wages of men up there at that time?

A. In September, 1911, the going wages were \$5 a day and board.

Q. What were horses worth about that time, to work by the day— [79—68] do you know about what horses were worth at that time up there, for working purposes? A. Yes.

Q. How much per day?

A. Ten dollars—any places I have ever been a horse was the same as a man's wages and his feed.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Judge LYONS.)

Q. Do you know anybody up there who was renting or hiring horses for \$10 a day? A. Yes, sir.

Q. Who? A. George Labelle.

Q. How many horses did he have?

A. He had two.

Q. What was he doing?

A. Packing; he ran a pack train up there, packing



(Testimony of Louis Bub.)

the mail up or anything a man wanted up there and any small articles anybody wanted.

Q. Do you know anybody he rented horses to for ten dollars a day? A. Yes, sir.

Q. Who? A. Mr. Murray.

Q. What was Mr. Murray doing with the horses?

A. He rode them in from McDougall to Cache Creek.

Q. To Cache Creek? A. Yes, sir.

Q. For how long a time? [80—69]

A. It took him three days and a half or four days, I wouldn't be sure.

Q. He was simply taking the horses in for the other man? Where was he bringing the horses from? You said this other party was using these horses for carrying the mails and carried little articles in with him? A. Yes.

Q. How long did he carry the mail?

A. He carried the mail all summer.

Q. Then he wasn't hiring the horses out every day?

A. Why, he could easily pack the horse, pack the mail, rather, on one horse.

Q. Was he renting the horses out every day?

A. No, there wasn't enough business up there to rent them out every day but any time anybody wanted them he could get them for ten dollars a day.

Q. Who owned this horse? A. We did.

Q. You and Mr. Brahenburg owned the horse?

A. I and my partner.

Q. Now, this ditch that you describe that was put in there by the Cache Creek Mining Co., the plain-



(Testimony of Louis Bub.)

tiff—is it not a fact that that ditch could be finished up and made a good serviceable ditch?

A. Yes, by a lot of work.

Q. You had to do a lot of work on your ditch, didn't you?

A. Yes, but we completed 3,000 feet of ditch for \$800, whereas they have just got 1,400 feet started for \$600.

Q. I thought you stated a while ago that there was about 1,600 feet there? [81—70]

A. 14 or 1600 feet; I don't know exactly; between that.

Q. You saw Anderson up there surveying, you testified? A. Yes.

Q. With a tripod and level?

A. That is what he called surveying—he said he surveyed it.

Q. He was using a tripod and level? A. Yes.

Q. Isn't that work? A. It might be.

Q. What were you doing up there? A. Mining.

Q. Where? A. On Dollar Creek.

Q. How far is your claim from where this work of the company is going on, where you are mining?

A. I should say about two claims and a half lengths.

Q. About 4,500 feet, is that about it?

A. Yes, something like that.

Q. You go up there every day? A. Yes, sir.

Q. You think they were working over there for fun, those people.

(Testimony of Louis Bub.)

Mr. RITCHIE.—We object to that as calling for a conclusion.

Objection sustained.

Q. How large a plow was this the plaintiff was using there? A. I couldn't say.

Q. You didn't see the plow? A. Yes, I did.

Q. Do you know how large it was? A. No.

Q. What kind of a plow was it? [82—71]

A. Breaking plow, I think; I wouldn't be sure—I didn't pay any particular attention to it.

Q. Did you see the scraper? A. Yes, sir.

Q. You say Anderson wasn't doing anything at all? A. He wasn't when I see him.

Q. You didn't pay much attention to the plow and scraper but took particular pains to see that Anderson wasn't working at all—wasn't when you saw him?

A. The man was standing there; you can't help seeing he is not working.

Q. What was he doing—standing up?

A. I saw him several times—he was sitting down on the plow.

Q. Was the plow idle? A. Yes, sir.

Q. I thought you said they were working the plow?

A. They would use the scraper once in a while.

Q. It is a fact that if this ditch is finished up it can be made a serviceable ditch, according to your testimony. A. There is no water to go through it.

Q. The ditch would be all right if there was water, wouldn't it? A. It is not now.

(Testimony of Louis Bub.)

Q. I say if there was—suppose there is water, if they finished it, it would be all right?      A. Yes.

(By the COURT.)

Q. Suppose they take your water.

A. Then we will have to quit mining.

Q. Suppose they claim they are the owners of that water and [83—72] intend to take it and you are going to have a lawsuit about it afterwards—do you think it would be serviceable, could they use it if they took your water—could they use it to take the water out of Dollar Creek that you are now using?

A. Yes, sir; it is above our ditches; if they complete that ditch it will take the water out above our two ditches.

Q. How do you know they do not intend to do that?

A. I don't know—they surely have not made very strong efforts to complete it.

(By Judge LYONS.)

Q. They have another ditch tapping Falls Creek, haven't they, the same company?

A. Why I think they have got two, that is, started.

Q. They have started two ditches, have they?

A. Yes, they started one out of Falls Creek in 1911 and they started another one this fall.

Q. You have two ditches, haven't you?

A. Yes, sir, they are completed, water through them.

Q. It took you some time to complete them, did it not?      A. Not very long.

Q. You didn't have them completed in a day?

A. No.



(Testimony of Louis Bub.)

Q. Nor in a week?      A. No, sir.

Q. How long did it take you to complete them?

A. My partner and I dug one, the lower ditch, and completed it in fifteen or sixteen days, I think it was, and had the water running through it.

Q. Can the water be taken out of Cache Creek or Falls Creek to wash this ground or gravel down on Number 1 above on [84—73] Dollar and these other Dollar claims?

Mr. RITCHIE.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled.

Q. They can run it part way through this ditch, after the ditch is completed?

A. Yes, sir, it can go across but if they take the water out of Falls Creek, they take the water away from people mining on Falls Creek.

(By Mr. RITCHIE.)

Q. You stated a while ago that you and Brahenburg built 3,000 feet of ditch for \$800?

A. No, sir, we had men hired and built it for that purpose.

Q. You stated the cost of building 3,000 feet of ditch was \$800?      A. Yes, sir.

Q. What is the depth and width of that ditch?

A. It is two feet deep and four feet wide at the bottom, on the average.

Q. A complete ditch that carries water?

A. Yes, sir.

Q. With a good bottom?      A. Yes, sir.

Q. Does the work that has been done in two years



(Testimony of Louis Bub.)

on the Cache Creek Mining Co. ditch, on this ditch here, amount to as much as the work on your 3,000 foot ditch? As to the amount of labor and result, does what they have done in two years amount to as much as this \$800 ditch of yours?      A. No, sir.

Q. Half as much? [85—74]      A. No, sir.

Q. Did you in the fall of 1911 know of the Cache Creek Mining Co. hiring any horses,—the fall and winter of 1911, hiring any horses to anybody?

A. Yes, sir.

Q. Just state.

A. They hired them to us for freighting purposes.

Q. When was that?

A. That was in January, I think.

Q. In January, 1912?      A. In January, 1912.

Q. What did they hire to you and at what figure?

A. Why we hired the outfit by the day—\$100 for the outfit.

Q. What was in the outfit?

Q. We had one horse and he took sick and was sick four days, and these four days we had seven horses of the Cache Creek Mining Co. in the outfit, besides four men.

Q. What was included in the outfit, horses and men and everything else?

A. There was seven horses for four days and six for four and a half and these double-enders—six double-enders and trailers and four men.

Q. Did the Cache Creek Mining Co. furnish everything?      A. They furnished everything.

(Testimony of Louis Bub.)

Q. The board of the men and the feed for the horses?

A. The board of the men and the feed for the horses and everything.

(By Judge LYONS.)

Q. Were these horses used where the ditch work was done, the [86—75] horses you spoke about hiring?

A. No, sir, we never hired no horses on the ditch.

Q. How far was it away from the ditch?

A. This was on the trail.

Q. How far is that away from where these operations, this assessment work, was done?

A. We had them hired to land the stuff within five miles of there, 5½ miles, in a straight line.

Q. Did you use the men all the time within five miles of these claims?

A. No, sir, we didn't use them all the time.

Q. Where did you use them?

A. Just to land the stuff over there and we freighted from there down, up to the camp, with our horse.

Q. How far was it away from this work that was done on the ditch?      A. About five miles.

Q. You were working within five miles of there all the time?      A. No.

Q. How far were you away?

A. You mean in the summer time?

Q. When you were using these horses?

A. Sometimes really it would be fourteen miles

(Testimony of Louis Bub.)

away—one day, and the next day we go fourteen miles closer.

Q. Were horses any cheaper there than they would be right where this work was done?

A. I don't think so.

Q. What would it cost to get stuff from where you were using these horses in where the work was done on the ditch?

A. It wouldn't cost but very little more. [87—76]

Q. It wouldn't cost but very little more?

A. No, sir; we were freighting stuff in there, contracting to take stuff in there, for 7¼ cents a pound.

Q. How much is that a ton?

A. You can figure it out.

Q. That is a pretty good price per ton, is it not,—about \$150 a ton?      A. Yes.

Mr. RITCHIE.—\$145 to be exact.

(By Mr. RITCHIE.)

Q. When you had this Cache Creek outfit, where did you freight from and where to?

A. From about seventeen miles along the trail to the mouth of Dollar Creek; it would be seventeen miles from McDougall.

Witness excused. [88—77]

**[Testimony of John Rimmer, for Defendant.]**

JOHN RIMMER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?      A. John Rimmer.



(Testimony of John Rimmer.)

Q. Where do you reside?      A. Susitna.

Q. How long have you been up there?

A. About seven years and a half.

Q. Have you been working in the Yentna country?

A. Yes, sir.

Q. What is your business?      A. Mining.

Q. Are you acquainted with the country around Dollar Creek?      A. Yes, sir.

Q. Do you know Brahenburg and Bub and Anderson?      A. Yes, sir.

Q. How long have you known them?

A. Since 1906.

Q. Where were you in September, 1911?

A. I was on Falls Creek.

Q. Do you know a place along Dollar Creek where the Cache Creek Mining Co. has started a ditch?

A. Yes, sir.

Q. How far were you working from them in September, 1911, when the work was being done?

A. About a mile, I guess—a little over, probably.

Q. What were you doing on Falls Creek?

A. Mining.

Q. Did you see any of this work when it was being done or afterwards? [89—78]      A. Afterwards.

Q. Did you see it while it was going on?

A. I went by it at a distance and didn't see it.

Q. Describe to the jury just what that ditch was like shortly after they were working there in September, 1911.

A. It was just plowing and scraping, preliminary work,—that is all I could see.



(Testimony of John Rimmer.)

Q. About how long was it?     A. About 1,400 feet.

Q. How wide and deep was it, on the average?

A. There are places 18 inches and other places it wasn't so deep—different depths and widths all through.

Q. Was there any place where the depth was very slight?     A. Yes, just a sod pulled off.

Q. To what extent was that?

A. Probably two-thirds of it.

Q. At which end?     A. The lower end.

Q. Where was the deepest work?

A. At the upper end.

Q. What were the going wages of men at that time in that district?     A. Five dollars a day and board.

Q. Do you know what horses were worth up there?

A. I do not, only by what this packer packed for this summer—that is all I know.

Q. Are you familiar with the value of horses for working purposes in the interior country generally, as compared with the *ages* of men?

A. No, I am not.     [90—79]

Q. Are you familiar with the country there along Dollar Creek, that is, the character of the ground?

A. Yes, sir.

Q. And do you know about how much work it takes to move such dirt as was moved by the Cache Creek Mining Co. there?     A. I think I do.

Q. What would you say that work is worth?

By the COURT.—What is that work worth done the way the plaintiff says he did it, not what is it worth done some other way.

(Testimony of John Rimmer.)

Judge LYONS.—We object to it.

By the COURT.—I think it is competent. The weight of it is with the jury. He may answer. The jury may take into consideration what kind of work it was and what he knows about it—the whole weight of the evidence will be with the jury; I think I will admit it.

Plaintiff allowed an exception to the ruling.

A. Why, I think about \$150 would be a liberal allowance for that amount of work in the ditch.

Mr. RITCHIE.—That's all.

Cross-examination.

(By Judge LYONS.)

Q. Do you know how many days those horses worked up there? A. I don't know, no, sir.

Q. What is a horse worth a day up there?

A. I couldn't tell. I never use horses. I use dogs altogether.

Q. You don't know how many days the horses worked there? A. No, sir.

Q. And don't know how many horses worked there? A. No.

Q. You don't know how many men worked there?  
[91—80]

A. There was four men with the cook and Anderson.

Q. How long were they working there?

A. Between a week and ten days, as near as I can tell you.

Q. What were those men worth per day?

A. Five dollars and their board.

(Testimony of John Rimmer.)

Q. And what is their board worth?

A. About two dollars, I guess; that is what they figure it in the camp there.

Q. That is about \$7 a day to the man?

A. Yes, sir.

Q. And there were four men working there?

A. Three men were working there, one was the cook.

Q. He was working there?

A. Yes, he was working on Falls Creek; yes.

Q. That was \$21 a day?      A. Yes, sir.

Q. That itself would be over \$200, wouldn't it, for ten days?

A. Yes, for ten days, but we don't admit they worked ten days.

Q. How many days did they work?

A. You have the testimony of the men that know—I don't know positively; I couldn't say.

Q. You don't know whether they worked five or ten days?      A. No, I do not.

Q. Suppose they worked ten days, that would be over \$150 for the men alone, according to your testimony?      A. Yes, sir.

Q. You say you are about a mile from them, from that ditch?

A. Yes, just about, probably a little more.

Q. What time did you see the work after the work was done?

A. I have been over it numerous times. [92—81]

Q. After the work was done?      A. Yes, sir.

Q. What were you doing over there?



(Testimony of John Rimmer.)

A. Hunting and walking around the country.

Q. Did you notice the work particularly?

A. I did; yes, sir.

Q. Now, I will ask you if that ditch, if there was more work done on it, couldn't that be made into a good serviceable ditch?

A. I guess it could, if it is ever finished; yes, sir.

Q. It could be finished, could it not?

A. It could be, yes—there is nothing impossible.

Q. That ditch is not impossible, is it?

A. No, sir.

Q. You are quite friendly to the defendants here?

A. Yes, sir.

Q. Did you see them plowing there?

A. At a distance, that is all.

Q. You were at a distance all the time?

A. While they were working there I was, yes—I never went by their work while they were working there.

Q. Are you a mining engineer?      A. I am not.

Q. Just an every-day miner?

A. Just an every-day miner; yes, sir.

Witness excused. [93—82]

**[Testimony of G. M. Callahan, for Defendant.]**

G. M. CALLAHAN, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. RITCHIE.)

Q. What is your name?      A. G. M. Callahan.

Q. Where do you reside?



(Testimony of G. M. Callahan.)

A. At present in Valdez.

Q. What is your business?

A. I have been prospecting and mining.

Q. How long have you been a prospector and miner?     A. Since 1898.

Q. How long have you been in Alaska?

A. I came to Dawson in '98.

Q. Have you been in various mining camps of the interior?     A. I have.

Q. Are you familiar with the use of horses in mining?     A. Well, not particularly in mining.

Q. Around mining work, in the mining country?

A. Yes, I am, in the mining country.

Q. What is the usual relation of wages between men and horses, that is, are horses worth less or more than men?

Judge LYONS.—We object to that as having nothing to do with the question, unless he was right in there in that country.

Mr. RITCHIE.—We want to show that everywhere in the interior there is a certain relative value between men and horses which would hold in that district, etc.

Objection sustained. Defendant allowed an exception.

Witness excused. [94—83]

[Testimony of Henry Brahenburg, for Defendant  
(Recalled).]

HENRY BRAHENBURG, recalled.

(By Mr. RITCHIE.)

Q. Do you know from statements made at the

(Testimony of Henry Brahenburg.)

time, either by Mr. Anderson or the men he employed, what wages those men were receiving on that work?     A. One hundred dollars per month.

Q. Do you know?     A. Yes, sir.

Q. How do you know?

A. By the men that worked there.

Q. Carlson and Winters?     A. Yes, sir.

Q. What did they say they were receiving?

A. \$100 per month.

Judge LYONS.—\$100 per month and board?

A. And board.

Q. And grub?     A. Yes, sir.

Witness excused.

**[Testimony of Louis Bub, for Defendant (Recalled).]**

LOUIS BUB, recalled.

(By Mr. RITCHIE.)

Q. Do you know by statements made, either by the men who were working there, or Anderson, what wages the men were receiving on that ditch work?

A. Yes, sir.

Q. What was it?     A. \$100 per month.

Q. And board?     A. And board.

Witness excused.

Defendant rests.     **[95—84]**

**REBUTTAL.**

[**Testimony of Joseph Anderson, for Plaintiff (Recalled in Rebuttal).**]

JOSEPH ANDERSON, recalled by the plaintiff as a witness in rebuttal, testified as follows:

Direct Examination.

(By Judge LYONS.)

Q. What was the cost of that work—to build that ditch?

A. My figures when I stopped working on there was \$618, I think.

Q. In estimating that cost, did you charge anything for the tools used there?      A. I did not.

Q. Did you charge anything for any other equipment there?

A. No equipment whatever—charged nothing for breaking of hammers or tools or anything of that kind.

Q. How large was that plow you used there?

A. It was either a fourteen or sixteen inch breaking plow—I have forgotten which; not less than 14.

Q. That is the furrow you would cut would be 14 or 16 inches wide?      A. Yes.

Q. What kind of a formation did you have to plow there?

A. From the upper end of the ditch down to where this spur runs off here is all gravel; the plow in cutting the first furrow would hit gravel practically all the way and there is some large boulders we had to use picks to take out.



(Testimony of Joseph Anderson.)

Q. In some places?      A. In some places.

Q. Where were these horses used that these defendants here testify about, the horses they hired from plaintiff?

A. They were used from about 17 miles the other side of [96—85] McDougall to the mouth of Dollar Creek. The average distance we had to haul the feed for them was only about half what it would be where the work was done at the ditch, a little over half the distance,—not very much.

Q. The cost of the feed for the horses would be much less where they were working the horses than it would be where you were working?

A. Yes, sir.

Q. Much less?

A. Considerably less, because we never moved any horse feed.

Judge LYONS.—That is all.

(By Mr. RITCHIE.)

Q. The same freight is paid to McDougall on that hay as anywhere else?

A. To McDougall, yes.

Q. And aren't horses worth more in the winter time than in the summer?      A. No.

Q. Doesn't it take more to feed a horse in cold weather than warm weather?

A. Not when they are working hard—I can't see any difference.

Q. In the summer time we can turn a horse out when he is not working and he will graze.

A. Yes, when he is not working.



(Testimony of Joseph Anderson.)

Q. And winter time you have to feed him right along?     A. Yes, sir.

Q. And the horse is really worth more and brings more, the demand being equal, in winter time than summer time?

A. No, not when he is working, because everywhere where they use horses, in Nome and Iditarod, is what they bring there [97—86] for most every kind of work.

Q. You figure the value of this ditch work was \$618—how do you put that together? Give me the items, please.

A. Well, Victor Carlson, September 9, 10, 11, 12, 13, 14, 15 and 16.

Q. Eight days—what do you allow for his work?

A. \$100 a month and board.

Q. What do you figure his board worth?

A. Three dollars a day.

Q. And for eight days he would be entitled to a little over \$25 wages, a small fraction over a quarter of a month?     A. Wages, without the board.

Q. Yes—it would be \$26 or \$27 for his wages?

A. Something like that.

Q. And eight days' board would be \$24?

A. Yes.

Q. Then for each of those men, including the cook, their board and wages would be about \$50 altogether for those eight days?

A. But the cook was receiving more than that—he was receiving \$125.

Q. The two men that worked for \$100 a month, they

(Testimony of Joseph Anderson.)

were paid about \$50 apiece, board and all?

A. \$50.64.

Q. That would be \$101.28 for the two. Now, what do you figure the cook was paid? A. \$71.60.

Q. And what did you receive? A. \$88.

Q. And Charley Nawn? [98—87] A. \$6.33.

Q. That was for work in packing over there?

A. Yes, sir.

Q. He didn't do anything on the ground?

A. Not on the ground itself.

Q. What he did was to help at the camp?

A. It was packing up the outfit used there, getting everything ready while the other men were doing the other work.

Q. Wasn't that all charged against freight?

A. No, sir, we had to pay him for his time just the same.

Q. Do I understand you to say that the grub is worth \$3 a day that the men ate there?

A. With the cook's wages included.

Q. You are charging the cook's wages—you can't charge the cook's wages on the grub and then pay the cook besides—which way did you figure the three dollars?

A. That is right—it must be with the cook's wages included.

Q. Now, what are the other items of this \$618?

A. Three horses, \$117 each, nine days each.

Q. Where did you get in the nine days?

A. One day packing over.

Q. What did you figure the horses at?

(Testimony of Joseph Anderson.)

A. \$13 apiece.

Q. That is what they are worth, keep and all?

A. That is what they are worth, keep and all.

Q. \$39 a day for the three horses?

A. Yes.

Q. For the nine days?      A. Yes, sir.

Q. That would be \$351?    [99—88]

A. \$351 I think is right.

Q. That comprises all the items?

A. Outside of—I made no charge for use of equipment or anything like that.

Q. Is it usual to employ a cook for a camp of three men?

A. It is usual because we have a cook all the time there and consequently had to pay him and he done other work around.

Q. Did he do any work on the ditch?

A. No, but he was fixing our tent and things that we would have had to stop and do, if he hadn't been there—getting wood and all that kind of thing.

Q. He was employed all the time?

A. He was employed all the time.

(By Judge LYONS.)

Q. It came out here in the testimony that you were not doing any work yourself over on the ditch—is that true?

A. Well, I was using a pick and loosening up the dirt so that they could get at it with the scraper and getting out loose rock, if that was work.

Q. You stayed right on your ground?

A. Yes, sir, all the time.



(Testimony of Joseph Anderson.)

Q. You didn't go over to see what Brahenburg and Bub were doing?     A. No, sir.

By Mr. RITCHIE.—Your men were working steadily all the time? For the eight days?

A. They were working steadily all the time.

(By JUROR.)

Q. You figure those horses at \$13 a day—had you any other work for those horses at the same time? [100—89]     A. Yes, sir.

By the COURT.—Do you mean that during those eight days those horses did other work?

JUROR.—No, had they other work for them?

By the COURT.—At or about that time?

JUROR.—Yes, sir.

The WITNESS.—Yes, sir.

Q. How long did it take to survey that ditch approximately?

A. I don't really remember—I went over it several times and had to go up to the head of the creek to see what kind of an intake I had and what the conditions were along there—I don't remember how many times I was over there.

Q. What are the wages of surveyors in that country per day?

A. That I couldn't answer because I don't think there was a surveyor there, except the engineer we had there for two years.

Mr. RITCHIE.—Are you a surveyor yourself?

A. No, sir.

(By Mr. RITCHIE.)

Q. At the time you walked over there to make that



(Testimony of Joseph Anderson.)

preliminary survey you were working on a general salary for the company?     A. Yes.

Q. Your general work was merely supervision of all other work?     A. Yes, sir.

Q. What was your salary?

A. I think the first time I was there it was \$200 a month and at the time of this assessment work it was \$5 a day.

Q. You mean thirty days in the month, \$5 a day?

A. Yes, sir.

Q. When you went over there to make that preliminary survey [101—90] were you neglecting any other work?     A. No.

Witness excused.

Judge LYONS.—That is all the testimony I have.

Mr. RITCHIE.—I want to recall the witness Brahenburg on a matter I overlooked.

By the COURT.—Very well.

[Testimony of Henry Brahenburg, for Defendant  
(Recalled in Rebuttal).]

HENRY BRAHENBURG, recalled.

(By Mr. RITCHIE.)

Q. When did you locate this claim?

A. The first day of August, 1912.

Q. What did you do about locating it?

A. I just located it the same as I would any other claim.

Q. Tell what you did.

A. Put up a notice; it already had stakes on,—I used the same stakes; just put up a notice, an extra

(Testimony of Henry Brahenburg.)

notice—the old notice there had disappeared.

Q. When you finished locating were the corner stakes on the ground?     A. Yes, sir.

Q. The old stakes were there all the time?

A. Yes, sir.

Q. Just state what stakes were on the ground.

A. Well, the four corner stakes and the two center stakes, they were willow stakes.

Q. There were four corner stakes?     A. Yes, sir.

Q. Did you make a discovery or did you have any knowledge of mineral on the ground? [102—91]

A. No, never had done any work on it at all.

Q. Did you have any knowledge of the existence of mineral on the ground?

A. Yes, a little—I know what little work had been done on it before that—there was a little money there.

Q. There was pay there?

A. Yes, shallow ground, a very steep creek, and narrow.

Q. Did you record the notice?     A. Yes, sir.

Q. You have that notice here, have you?

A. Yes, I have it here—I haven't it with me, though, just now.

Q. Where is it?     A. Down at my room.

(Recess for five minutes to enable witness to get notice.)

Q. Have you a copy of your notice of location which you filed?     A. Yes, sir—this is a copy of it.

Q. Is this the copy that was filed?     A. Yes, sir.

Mr. RITCHIE.—We offer it in evidence, including the record on the back.

(Testimony of Henry Brahenburg.)

Admitted without objection and marked Defts. Exhibit #4.

Mr. RITCHIE.—That is all.

Cross-examination.

(By Judge LYONS.)

Q. When did you locate that claim?

A. The first day of August, 1912.

Q. Will you explain to the jury just what you did when locating that claim?

A. I just located it the same as I would any other claim—put up the notice. [103—92]

Q. Where did you put up the notice?

A. On the upper end of the claim, on the center post that had been standing there for seven or eight years,—seven or eight or nine years.

Q. On the same post?

A. The center post on the creek, at that end of the claim—no, I believe the old location was down at the lower end.

Q. The old location notice?      A. Yes, sir.

Q. What kind of a notice did you put up on your post?      A. That is a copy of it.

Q. A copy of that?      A. Yes, sir.

Q. What did you do then, when you put up that notice?

A. The next thing I done was to get it recorded.

Q. Get the notice recorded?

A. Yes, in probably a month or later,—I forget the date.

Q. Then what did you do?

A. I worked assessments on the claim.



(Testimony of Henry Brahenburg.)

Q. When did you do the assessment work?

A. I done it last fall and a year ago.

Mr. RITCHIE.—We object as immaterial, because it is not necessary for him to do any assessment work at all this year; it was located under the old law which only made it necessary to do assessment work in the following calendar year.

Judge LYONS.—I will withdraw the question.

By the COURT.—The act of Congress changing the law for doing the assessment work—I forget what month that was passed in.

Mr. RITCHIE.—I think it was about August 12, 1912.

By the COURT.—You testified you did the assessment work in [104—93] 1912, anyway?

A. Yes, I did two assessment works on it.

Q. 1912 and 1913? A. Yes, sir.

Q. Refer more particularly to what you did toward the location of the claim; you say you posted up a copy of your location notice on the discovery post—what did you do after that?

A. We didn't do anything, we just located it; the stakes were all up; we went around to the stakes; there was no use my putting up any more stakes; they were all up. I put new blazes on them and re-marked them, that is all, about all, I did do to it until I did the assessment work that fall for 1912.

Q. Did you know that property belonged to the Cache Creek Mining Co.?

A. Yes, I did, that they did own it, yes—at one time.



(Testimony of Henry Brahenburg.)

Q. Hadn't they done some work there in the month of July, 1912?

A. After I located, yes; there was three years there there never has been any work done on the whole of Dollar Creek by the Cache Creek people, never has.

Q. Don't you know as a matter of fact that Joe Eberhardt was working there in July, 1912?

A. After the claim was in dispute, he went to work on it, yes.

Q. When did the claim get in dispute?

A. The first day of August.

Q. He didn't do any work in July?

A. He was over there, but he didn't do any work, I know of.

Q. Didn't he do some prospecting work in the month of July, 1912?

A. He was over there trying to figure out a pay-streak through there, yes. [105—94]

Q. You know Eberhardt? A. Yes.

Q. As a matter of fact, the reason you took this claim, you wanted it as a dumping ground for your own property?

A. That is all it is probably worth to us.

Q. Weren't you served with a notice by the Cache Creek Mining Co. in the month of August to get off the property, it was their property?

A. Yes, I did, except working assessment work on it.

Q. Did you get a notice from the Cache Creek Mining Co. to keep off of there? A. I did.

Q. That the property belonged to them?

(Testimony of Henry Brahenburg.)

A. They gave us a notice, yes.

Q. You simply went in and jumped the property?

A. Yes, I went in and jumped the property, if you call it jumping—relocated it.

Judge LYONS.—That is all.

By Mr. RITCHIE.—The notice you received from the Cache Creek Mining Company was after you had relocated?

A. Yes, it was afterwards.

(By the COURT.)

Q. You say that you re-marked the stakes—what did you put on them when you re-marked them?

A. Well, they were all weather-worn stakes and I just reblazed them and put the numbers—they were numbered, each corner post—just put a mark and number all the way around.

Q. Did you put on anything to show that you were claiming the claim? [106—95]

A. No, only on the initial stake where the notice was and the corner stakes and the other center stake was just the number.

(By Judge LYONS.)

Q. Did you find any mineral on the ground at that time? A. Oh, yes, I found mineral there.

Q. Did you find any gold there?

A. Nothing but a prospect, nothing but a very small prospect.

Q. When did you find that?

Mr. RITCHIE.—We object—if he knew of it any time before the location, it is a sufficient discovery.

By the COURT.—I think that is admitted in the

(Testimony of Henry Brahenburg.)

pleadings, Judge Lyons. You charge him with taking gold from it.

Judge LYONS.—I suppose our title is not disputed at all, in any way.

Mr. RITCHIE.—Except the failure to do the assessment work, that is conceded. It was located by Eberhardt and Anderson and transferred to the Cache Creek Mining Co. and at one time they owned it.

By the COURT.—It is admitted in the pleadings that you owned the claim and you still own it unless you have relinquished it by failure to do the assessment work.

Mr. RITCHIE.—Yes, sir, that is correct.

Judge LYONS.—I want to put Mr. Anderson on to show that Eberhardt did the assessment work in July, 1912.

Mr. RITCHIE.—I shall object to that for the reason that under the decision of the Circuit Court of Appeals if the company failed to do the work in the year 1911 the claim was wholly forfeited at midnight on the 31st of December. [107—96]

By the COURT.—I don't know just what Judge Lyons wishes to show. You may proceed.

Judge LYONS.—I want to show there was no abandonment of the claim on our part and all our work has been prosecuted in good faith all the way through.



[**Testimony of Joseph Anderson, for Plaintiff (Recalled in Rebuttal).**]

JOSEPH ANDERSON, recalled.

(By Judge LYONS.)

Q. You have already testified that you are familiar with Number One above on Dollar Creek?

A. Yes, sir.

Q. Do you know George Eberhardt?

A. Yes, sir.

Q. I will ask you if Eberhardt did any work on that claim in July, 1912?

A. Eberhardt and a man named Hurd went over there along about the 15th or 20th of July—I am not sure about the date—and done some prospecting there and afterwards, in July, Eberhardt went over there and was gone I think three days prospecting and said he was prospecting on the claim.

Mr. RITCHIE.—I don't think this is competent, but since Judge Lyons suggested it was wholly to show the good faith of the company I will not object.

Q. Did you see any of those stakes on Number One above on Dollar, after it was located by the defendant? A. I saw nothing but the old stakes.

Q. He didn't put up any new stakes?

A. Not to my knowledge.

Q. Any blazes on those stakes?

A. Not that I seen.

Q. Was there any change at all made in the stakes by Brahenburg? [108—97]



(Testimony of Joseph Anderson.)

A. I can't recall any.

Q. Did you see any notice on the claim, on a post at the center end?

A. I did long after it was located—after I was told about it.

Q. Did you serve a notice on him to the effect that the company claimed that property?      A. I did.

(By Mr. RITCHIE.)

Q. They served a notice on you too?

A. Verbally.

Q. No written notice?      A. No.

Q. Did you make a careful examination of those corner posts?      A. No, not very careful.

(By JUROR.)

Q. You said that Eberhardt worked on the claim—did you send Eberhardt over there? Was he working for the Cache Creek Mining Co. at the time?

A. He had a lease on the ground.

Q. And he told you he was prospecting there?

A. He told me he was prospecting there.

Q. I think in your statement you said that ground went \$22 to the man or shovel—how do you arrive at that figure?

A. I think I said that the best that was taken off of it was \$22 a man in one day using a pick and shovel.

Q. Then he must have been sluicing?

A. Yes, sluicing.

By Mr. RITCHIE.—Did you ever see any written notice posted up on the claim by Brahenburg & Bub

(Testimony of Joseph Anderson.)

notifying trespassers to keep off? [109—98]

A. I did not.

Witness excused.

Testimony closed.

### **Instructions of the Court.**

Gentlemen of the Jury:

It will not be necessary to give you any very extended instructions in this case because a great deal of the matter that usually goes to a jury for their determination in an ejectment suit on a mining claim is agreed to, that is, is not in issue; for instance, it is not in issue here that the plaintiff discovered gold and duly staked their claim according to law; it is not in issue here and there is no question before you that the defendant went upon this mining claim and took possession of it; there is no issue before you as to what damages have been caused. In other words, you have nothing to do with damages and you have nothing to do with deciding the question as to whether the defendant went upon the claim and took possession of it; you have nothing to do with the question as to whether or not the plaintiff discovered gold and staked the claim, because those things are admitted.

In this case it is also admitted that on the 31st day of December, 1910, the plaintiff had a good and indefeasible title to this claim; that is to say, it is admitted that before that time, December 31, 1910, they had discovered gold on the claim and had staked it according to law. That being the case they were the actual owners of said claim on said date, December 31, 1910, and they continue to own the claim to

this date unless [110—99] it has been shown to you by a preponderance of the evidence that they have not done the assessment work for the year 1911.

If you believe that it has been established by a preponderance of the evidence in this case that the plaintiff did not in the year 1911 do one hundred dollars' worth of work upon said claim, or to develop said claim—the work need not be done right on the claim, if it was done to develop the claim, done for the benefit of the claim—then on the 31st day of December, 1911, the claim became forfeited and open to relocation by any one else.

The defendants in this case claim and have offered evidence to prove that they relocated the claim according to law and there has been no evidence to the contrary, but this is not all they have to prove—they have to prove to you by a preponderance of the evidence that one hundred dollars' worth of work was not done by the plaintiff in the year 1911.

In other words, having admitted that the plaintiff had a good and indefeasible title and claiming as they do—that is, the defendants claiming as they do—that that title has been forfeited by the failure to perform assessment work, the burden is upon them to prove to you that the assessment work has not been done.

They have introduced evidence to show that it was not done. The plaintiff has introduced evidence to show that it was done—so the only question before you is as to whether or not it was done. If it was done, your verdict must be for the plaintiff; if it was not done, your verdict must be for the defendant.



Now, the question as to whether assessment work has been done or how much has been done has been the cause of innumerable controversies. Every relocater is interested in depreciating [111—100] the value of work performed by the original locator, and the original locator is interested in saving his claim from forfeiture. It is largely a question of opinion, upon which practical miners and experts will disagree. It is probable that testimony could be obtained to show that nearly all the annual assessment work done upon mining claims was of less value than the law required, excepting in cases where it so greatly exceeds the sum of one hundred dollars that there is no question about it.

While the amount paid is not conclusive that work of that value has been done, but the actual value is the true test whether or not the law has been complied with, yet, where the testimony is conflicting as to the value, it is proper to consider whether there has been a *bona fide* attempt to comply with the law.

In determining the amount of work done upon a claim, or improvements placed thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements—not what was paid for it or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars.

A mere expenditure is not sufficient. The work must tend to develop the claim and must be of the reasonable value claimed.

Cost is an element in establishing the value, and



while not conclusive strongly tends to establish the good faith of the claimant.

Now, the question is entirely one with you. You are not to have any prejudice against the plaintiff, nor any bias in his favor, nor to try the parties otherwise than as if they were just A and B—you don't know anything about A and you don't know [112—101] anything about B. There is just that question before you, the question to be decided upon the evidence that has been introduced. As one counsel has said and as the other might just as well have said, you are at liberty to use your own common sense about this case—you are not supposed to be a dummy. If there is any matter that is absolutely and entirely within the knowledge of other men, why you are not supposed to be any more ignorant than anybody else, but take the evidence as you have heard it and use your common sense in deciding the question.

And in determining who you want to believe, take all the facts and circumstances into consideration, weigh the testimony and don't count it—testimony is not to be counted by the number of witnesses, but it is to be weighed by its intrinsic worth; that is to say, consider what opportunities the men had who testified to know what they were testifying about, consider their willingness or unwillingness to tell the truth and the whole truth, their candor or lack of candor and their interest in the matter—take all these things into consideration and by a careful comparison and consideration of all the evidence in the case make up your mind on which side is the pre-

ponderance of the testimony.

I hand you two forms of verdict, one for the plaintiff and one for the defendant. Have your foreman sign whichever verdict you agree upon and return it into court.

Mr. RITCHIE.—I want to take an exception; shall I do it now?

By the COURT.—You may take it after the jury retires.

**[Exceptions to Instructions.]**

The jury having retired—

By Mr. RITCHIE.—The defendant excepts to so much of the instructions of the Court to the jury as stated that the burden of proof of forfeiture is upon the defendant in this case.

(Exception allowed.) [113]

**[Certificate of Stenographer to Transcript.]**

I do hereby certify that I am the official Court Stenographer for the Third Judicial Division of Alaska; that as such official court stenographer I reported the proceedings in the above-entitled action, to wit, Cache Creek Mining Co. vs. Henry Brahenburg; that the above is a full, true and correct transcript of my shorthand notes taken at the trial of said cause.

Dated at Valdez, Alaska, this 6th day of January, 1914.

I. HAMBURGER. [114]

*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,  
Plaintiff,

vs.

HENRY BAHRENBURG,  
Defendant.

**Verdict.**

We, the jury impaneled and sworn in the above-entitled cause, do upon our oaths find for the defendant, that he is the lawful owner and entitled to the possession of the mining claim known as Number One above Discovery on Dollar Creek, Yentna Mining District, Territory of Alaska.

G. H. REMINGTON,  
Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 26, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 8, page No. 1. [115]



*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

**Judgment.**

This cause came on for trial on the 25th day of November, A. D. 1913; plaintiff appearing by its counsel, John Lyons, and the defendant appearing in person and by his attorney, E. E. Ritchie. A jury of twelve men was duly empaneled and sworn to try the cause. The parties introduced their testimony and rested. After arguments by counsel, the Court instructed the jury and the jury retired on the same day to deliberate upon their verdict. It was stipulated by counsel that if the jury should find a verdict, the same might be returned as a sealed verdict on the following day. Thereafter, on the 26th day of November, the jury returned into court and by their foreman returned their sealed verdict into court, by which verdict they found for the defendant, that he is the lawful owner and entitled to the possession of the mining claim, known as "Number One above Discovery" on Dollar Creek, in the Yentna Mining District, Territory of Alaska.



THEREAFTER, on the same day, the plaintiff, by its attorney, John Lyons, moved the Court for a new trial of said cause, which motion was argued by counsel on the same day and was by the Court denied.

It was thereupon stipulated by and between the parties in open court, that plaintiff should have ninety days [116] (90) in which to prepare and settle a bill of exceptions on appeal herein.

Wherefore, by reason of the law in the premises, hereinbefore recited,

IT IS ORDERED AND ADJUDGED by the Court that the defendant is the owner, subject to the paramount title of the United States, and entitled to the possession of the mining claim known as "Number One above Discovery" on Dollar Creek, in the Yentna Mining District, Territory of Alaska; and that the defendant recover his costs in this action, taxed at \$——.

ROBERT W. JENNINGS,  
District Judge.

Dated at Valdez, Alaska, this 26th day of November, A. D. 1913.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 26, 1913. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

Entered Court Journal No. 8, page No. 9. [117]

*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpo-  
ration,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

**Motion for New Trial.**

Comes now the plaintiff in the above-entitled action, by its attorney, John Lyons, and moves the Court for an order to set aside the verdict rendered by the jury on the 26th day of November, 1913, and to grant a new trial of this cause, upon the following grounds, to wit:

I.

Newly discovered evidence, which could not have been produced by the plaintiff in the trial of said cause, as appears by the affidavit of Joseph Anderson hereto attached.

II.

Insufficiency of the evidence to justify the verdict rendered by said jury and that it is against the law. The evidence of the plaintiff showed that the said plaintiff constructed a ditch about sixteen hundred feet in length, for the purpose of conducting water from a point near the source of Dollar Creek, in the Yentna Mining District, in the Territory of Alaska,

to wash the gold-bearing gravel on the mining claim, involved in said action, and that the construction of said ditch, constituted assessment work, and tended to the development of said claim. The defendants produced no evidence denying that said work would develop said claim or tend to its development.

III.

Error in law occurring at the trial, and excepted [118] to by the plaintiff, in this, that the trial Court erred in refusing to permit the plaintiff to introduce in evidence the affidavit of annual labor, executed by Joseph Anderson, to the effect that said labor and improvements were made by the plaintiff for the benefit of said mining claims for year 1911.

JOHN LYONS,  
Attorney for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 26, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [119]

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*In the District Court for the Territory of Alaska,  
Third Division.*

CACHE CREEK MINING COMPANY, a Corporation,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.



**Affidavit of Joseph Anderson.**

United States of America,  
Territory of Alaska,—ss.

Joseph Anderson, being first duly sworn according to law, deposes and says: That he is the manager and superintendent of the plaintiff in the above-entitled action, and as such superintendent the work performed by said plaintiff in the month of September, 1911, in doing the annual labor required by law, on the mining claim known as No. 1 above on Dollar Creek, in the Yentna Mining District, in the Territory of Alaska, which is the claim in controversy in this action; that he has discovered certain evidence, which could not with reasonable diligence be produced at the trial of said cause; that the names of said witnesses are George Winter, Victor Carlson, Andy Thomas, and George Eberhardt, who will each testify that said work was performed in accordance with law; that the said Winter, Carlson and Thomas were working for the plaintiff in the month of September, 1911, at the time the plaintiff constructed a certain ditch, for the development and benefit of said mining claim; that the said Eberhardt made an examination of said work after the same was completed, and that he will testify that the work performed was worth the sum of six hundred dollars, and that it tended to [120] the development of said claim.

JOSEPH ANDERSON.



Subscribed and sworn to before me this 26th day of November, 1913.

[Seal]

JOHN LYONS,

Notary Public for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Nov. 26, 1913. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

United States of America,  
Territory of Alaska,—ss.

DUE AND LEGAL SERVICE IS HEREBY ACCEPTED this 26th day of November, A. D. 1913, by receiving a copy thereof, duly certified to by John Lyons, one of the attorneys for the plaintiff.

E. E. RITCHIE,

Attorney for Defendants. [121]

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SPECIAL NOVEMBER, 1913, TERM—NOVEMBER 26th—9th COURT DAY, WEDNESDAY.

*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,

Plaintiff,

vs.

HENRY BRAHENBURG,

Defendant.

**Minute Order Denying New Trial.**

Now, on this day, came John Lyons, attorney for the plaintiff, and E. E. Ritchie, attorney for the de-

fendant, and this matter coming on for hearing upon plaintiff's motion for a new trial, and after arguments had and the Court being fully advised in the premises, said motion for a new trial is hereby denied.

Entered Journal No. 8, page No. 2. [122]

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*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Bill of Exceptions.**

Be it remembered that on the 27th day of March, 1913, plaintiff filed its complaint in the above-entitled court and cause. (Here insert copy of complaint.)

That on the 2d day of June, 1913, the defendant filed his answer in said cause (here insert copy of answer), and on the 3d day of June, 1913, the plaintiff filed its reply (here insert copy of reply); that thereafter and on the 25th day of November, 1913, the said cause came on regularly for trial before the court and a jury, and thereupon the following proceedings were had, to wit:

The plaintiff submitted its evidence by the oral testimony of Joseph Anderson and the depositions of

Malcolm McDougall and R. J. Cameron, and thereupon rested its case.

Thereafter the defendant submitted his evidence, by the oral testimony of the defendant, Louis Bub, John Rimmer and G. M. Callahan.

That thereafter and on the 25th day of November, 1913, the Court instructed the jury, and the jury having retired returned a verdict in favor of the defendant.

That on the said 26th day of November, 1913, the plaintiff filed its motion for a new trial, which was by the Court denied. (Here insert copy of motion for a new trial and order denying the same.) To which order plaintiff excepted and exception allowed.

That on the said 26th day of November, 1913, the Court made and entered its judgment herein, adjudging the defendant to be the owner, and entitled to the possession of that certain mining claim known as No. 1 above Discovery on Dollar Creek, in the Yentna Mining District, Territory of Alaska, and for his costs [123] in this action. (Here insert copy of judgment.)

Now comes the plaintiff in the above-entitled cause, and does make and file this its bill of exceptions, and prays the Court to file and settle the same, and have said bill of exceptions made a part of the record in said cause:

1. The plaintiff excepts to the ruling of the Court in admitting the evidence of the witness Rimmer, concerning the value of the work performed by the plaintiff, in doing its assessment work on the mining claim in dispute, namely, No. 1, above discovery on Dollar



Creek, in the month of September, 1911.

2. The plaintiff excepts to the ruling of the Court, in denying its motion for a new trial, made and entered on the 26th day of November, 1913.

3. The plaintiff excepts to the judgment of the Court entered in said cause on the 26th day of November, 1913, in favor of the defendant and against the plaintiff.

JOHN LYONS,

Attorney for Plaintiff and Appellant.

**Order Allowing Bill of Exceptions.**

The above and foregoing bill of exceptions and each of them are by this Court duly allowed, and such exceptions are hereby ordered filed and made a part of the record in said cause.

Dated this 16th day of February, 1914.

FRED M. BROWN,

District Judge.

Due and legal service is hereby accepted and admitted of the foregoing bill of exceptions, by receiving a copy thereof, this 16th day of February, 1914.

E. E. RITCHIE,

Attorney for Defendant and Appellee.

Entered Court Journal No. 8, page 111.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk.  
By T. P. Geraghty, Deputy. [124]



*In the District Court for the Territory of Alaska,  
Third Division.*

#S.—33.

CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Petition for Writ of Error.**

Comes now the Cache Creek Mining Company, plaintiff in the above-entitled cause, and says: That on the 26th day of November, 1913, a verdict was rendered by a jury, in favor of the defendant in the above-entitled cause, and judgment entered thereon by the above-entitled court, adjudging the defendant to be the owner of that certain placer mining claim known as No. 1 above Discovery on Dollar Creek, in the Yentna Mining District, in the Territory of Alaska, and for his costs and disbursements in this action.

That in the said judgment and the proceedings had prior thereto, certain errors were committed, to the prejudice of the plaintiff, all of which will more fully appear in the assignment of errors, which is filed with this petition.

Wherefore plaintiff prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a tran-

script of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

JOHN LYONS,

Attorney for Plaintiff and Appellant.

Due and legal service by copy of the above petition is hereby accepted and admitted this 13th day of January, 1914.

E. E. RITCHIE,

Attorney for Defendant and Appellee.

Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [125]

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*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,  
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Assignment of Errors.**

Comes now the Cache Creek Mining Company, the plaintiff in the above-entitled action, and makes and files the following assignment of errors, upon which the plaintiff will rely, in the prosecution of its writ of error, herein.

First. The Court erred in admitting the testimony of the witness Rimmer, which was objected to by the plaintiff, and which was in reference to the value of the assessment work performed by the plaintiff, in the month of September, 1911, for the reason that the witness testified and admitted, that he was unable to state the number of days that the plaintiff was actually engaged in performing said assessment work. On direct examination said witness testified as follows:

“Mr. RITCHIE.—What would you say that work is worth?

By the COURT.—What is that work worth done the way the plaintiff says he did it, not what it is worth done some other way?

Judge LYONS.—We object to it.

By the COURT.—I think it is competent. The weight of it is with the jury. He may answer. The jury may take into consideration, what kind of work it was and what he knows about it—the whole weight of the evidence will be with the jury; I think I will admit it. Plaintiff allowed an exception to the ruling.

A. Why I think about \$150 would be a liberal allowance for that amount of work in the ditch.

Cross-examination.

Q. Do you know how many days those horses worked up there?

A. I don't know; no, sir.

Q. What is a horse worth a day up there?

[126]

A. I couldn't tell; I never use horses; I use dogs altogether.



Q. You don't know how many days the horses worked up there?     A. No, sir.

Q. You don't know how many men worked up there?

A. There was four men with the cook and Anderson.

Q. How long were they working there?

A. Between a week and ten days as near as I can tell you.

Q. You don't know whether they worked five or ten days?     A. No, I do not."

Second. The Court erred in denying plaintiff's motion for a new trial, for the reason,—

(a) Newly discovered evidence, which could not have been produced by the plaintiff in the trial of said cause, pursuant to the affidavit attached to said motion, made by Joseph Anderson in support of the same, and which was not controverted by the defendant.

(b) Insufficiency of the evidence to justify the verdict, which was rendered by the jury, and that said verdict is against the law. The proof shows that the plaintiff expended the sum of \$618.00, in the performance of the assessment work on the claim in dispute, together with five other claims, which fact is nowhere denied by the defendant.

Third. The Court erred in entering judgment in said cause against the plaintiff and in favor of the defendant, for the reason that said judgment is against the law. The question of whether or not the annual assessment work was performed on the mining claim known as No. 1, above on Dollar Creek in the year

1911, is the only issue on said cause. It is apparent from the record that the plaintiff performed in the year 1911, \$618.00 worth of labor and improvements on or for the benefit of six mining claims on Dollar Creek, including the claim in dispute, in the month of September, 1911, which is not denied by the defendant.

Wherefore the plaintiff in error prays that the said judgment of the District Court for the Territory of Alaska, Third Division, may be reversed. [127]

JOHN LYONS,  
Attorney for Cache Creek Mining Company, and  
Plaintiff in Error.

Due and legal service of the foregoing assignment of errors is hereby accepted, by receiving a copy of the same, this 18 day of February, 1914.

E. E. RITCHIE,  
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [127½]

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*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Order Allowing Writ of Error.**

Now on this — day of February, 1914, the plaintiff appearing by its attorney, John Lyons, and filed and presented to the Court its petition, praying for the allowance for a Writ of Error, and the assignment of errors intended to be urged by it; and praying further that a transcript of the record and proceedings upon which the order and judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration of the premises, and the Court being fully advised, it is ordered that the aforesaid Writ of Error and the same is hereby allowed.

And it is further ordered that a transcript of the record, papers, files, and proceedings in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 18th day of February, 1914.

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 117. [128]



*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Writ of Error (Copy).**

To the President of the United States of America,  
The Honorable ROBERT W. JENNINGS,  
Judge of the District Court for the Territory of  
Alaska, First Division, Acting as Judge in the  
Third Division, in the Above-entitled Cause,  
Greeting:

Because in the records and proceedings, as also in  
the rendition of the judgment of a plea which is in  
said District Court, before you, or some of you, be-  
tween Cache Creek Mining Company, plaintiff, and  
Henry Brahenberg, defendant, manifest error hath  
happened, to the great damage of the said Cache  
Creek Mining Company, plaintiff, as is stated and ap-  
pears by the petition herein.

We being willing that error, if any hath been, shall  
be duly corrected, and full and speedy justice done to  
the parties aforesaid in this behalf, do command you,  
if judgment be therein given, that then under your  
seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same in the city of San Francisco, in the State of California, within sixty days from the date of this writ, in said Circuit Court of Appeals for the Ninth Circuit, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, and of the Territory of Alaska should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18 day of [129] February, A. D. 1914.

Attest my hand and the seal of the District Court for the Territory of Alaska, Third Division, in the clerk's office at Valdez, Alaska, on the day and year last above written.

[Seal]

ARTHUR LANG,

Clerk of the District Court for the Territory of Alaska, Third Division.

Writ of Error allowed this 18 day of February, 1914.

FRED M. BROWN,

District Judge.

Due and legal service of the foregoing writ of error is hereby accepted and admitted, by receiving a copy

thereof, this 18th day of February, A. D. 1914.

E. E. RITCHIE,

Attorney for Plaintiff and Defendant in Error.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 118. [130]

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*In the District Court for the Territory of Alaska,  
Third Division.*

#33—S.

CACHE CREEK MINING COMPANY, a Corporation,  
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Bond on Writ of Error.**

Know All Men by These Presents, that we, Cache Creek Mining Company, as principal, and Meyer Blum and A. E. Grigsby, as sureties, are held and firmly bound unto Henry Brahenberg, the defendant in error, in the full sum of Five Hundred (\$500.00) Dollars, in lawful money of the United States, to be paid to the said Henry Brahenberg, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.



Sealed with our seals, and dated this 16 day of February, 1914.

Whereas lately in the District Court for the Territory of Alaska, in the Third Division thereof, in an action at law pending in said court between Cache Creek Mining Company, plaintiff, and Henry Brahenberg, defendant, a judgment was rendered in favor of said defendant, and against the plaintiff, and the said Cache Creek Mining Company, having obtained a writ of error, and filed a copy thereof, in the clerk's office of said court, to reverse the judgment in the aforesaid action at law, and a citation directed to the said Henry Brahenberg, defendant, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in the State of California, on or after the — day of —, A. D. 1914.

Now the condition of the above obligation is such, that if the said Cache Creek Mining Company, shall prosecute said Writ of Error to effect and answer all damages and costs that may be awarded against it, if it fail to make said appeal good, then [131] this obligation to be void; otherwise to remain in full force and virtue.

CACHE CREEK MINING COMPANY,

Principal.

By JOHN LYONS,

Its Agent.

M. BLUM,

Surety.

A. E. GRIGSBY,

Surety.

Signed, sealed and delivered in the presence of  
JOHN LYONS,  
CHARLES A. FOWLKES.

Approved by:

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [132]

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*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,  
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Order Fixing Amount of Bond on Writ of Error.**

The plaintiff the Cache Creek Mining Company having this day filed its petition for a Writ of Error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made, fixing the amount of security which plaintiff should give and furnish upon said writ of error, and said petition having been allowed,

Now, therefore, it is ordered, that upon the said plaintiff Cache Creek Mining Company, filing with the Clerk of this court, a good and sufficient bond, in the sum of five hundred dollars, to the effect that if the said plaintiff, and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court, and that all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error, by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 16th day of February, 1914.

FRED M. BROWN,  
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 110. [133]

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*In the District Court for the Territory of Alaska,  
Third Division.*

#S.—33.

CACHE CREEK MINING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.



**Citation on Writ of Error (Copy).**

United States of America,  
Territory of Alaska,—ss.

The United States of America, to Henry Brahenberg  
and to E. E. Ritchie, His Attorney of Record,  
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City and County of San Francisco, in the State of California, within thirty days from the date of this writing pursuant to a Writ of Error, which is filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Cache Creek Mining Company is the plaintiff in error, and you, Henry Brahenberg, is the defendant in error, and to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 18 day of February, in the year of our Lord, 1914, and of the Independence of the United States, the one hundred and thirty-eighth.

FRED M. BROWN,  
Judge of the District Court for the Territory of  
Alaska, Third Division.

[Seal]            Attest:    ARTHUR LANG,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.

Due and legal service of the foregoing citation by receiving a copy thereof is hereby accepted this 18 day of February, A. D. 1914.

E. E. RITCHIE,  
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. T. P. Geraghty, Deputy. [134]

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*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,  
Plaintiff,

Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Order Extending Time in Which to File the Records  
in the United States Circuit Court of Appeals  
for the Ninth Circuit.**

It appearing to the satisfaction of the Court that thirty days is not sufficient time to prepare and send and have received by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, the records in the above-entitled cause, in the Writ of Error from the final judgment rendered herein on the 26th day of November, A. D. 1913:

It is therefore hereby ordered, that the said Cache

Creek Mining Company, plaintiff in error herein, have to the 1st day of April, 1914, in which to have prepared the said records on its Writ of Error heretofore issued in said cause, and to file the same in said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 18 day of February, A. D. 1914.

FRED M. BROWN,  
District Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 120. [135]

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*In the District Court for the Territory of Alaska,  
Third Division.*

S.—33.

CACHE CREEK MINING COMPANY, a Corporation,  
Plaintiff,

vs.

HENRY BRAHENBERG,

Defendant.

**Stipulation as to What shall Constitute the Record  
on Writ of Error.**

It is hereby stipulated and agreed, by and between the parties to the above-entitled action, by their respective attorneys, that the following is and



shall constitute a full, true and complete record on the Writ of Error in the above-entitled cause, to wit:

- 1st. Complaint.
- 2d. Answer.
- 3d. Reply.
- 4th. Plaintiff's Exhibit "A" and Defendant's Exhibits Nos. 1, 2, 3 and 4.
- 5th. Bill of Exceptions and transcript of Evidence.
- 6th. Instructions to Jury.
- 7th. Verdict of Jury.
- 8th. Judgment.
- 9th. Motion for New Trial and affidavit of Joseph Anderson in support thereof.
- 10th. Order Denying New Trial.
- 11th. Order settling and allowing Bill of Exceptions.
- 12th. Petition for Writ of Error.
- 13th. Order Allowing Writ of Error.
- 14th. Order Fixing Amount of Bond.
- 15th. Assignment of Errors.
- 16th. Writ of Error.
- 17th. Bond on Writ of Error.
- 18th. Citation to Defendant in Error.
- 19th. Order extending time in which to file record in Circuit Court [136] of Appeals.
- 20th. Stipulation as to what shall constitute record on Writ of Error.

Dated at Valdez, Alaska, this 18 day of February, 1914.

JOHN LYONS,

Attorney for Plaintiff in Error.

E. E. RITCHIE,

Attorney for Defendant in Error.

[Endorsement]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 18, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.  
[137]

*In the District Court for the Territory of Alaska,  
Third Division.*

**Certificate of Clerk U. S. District Court to Record.**  
United States of America,  
Territory of Alaska,  
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 138 pages, numbered from 1 to 138, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office;

That this transcript is made in accordance with the plaintiff's and appellant's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and that the cost thereof, amounting to \$62.10, was paid to me by John Lyons, attorney for plaintiff and appellant.

In witness whereof I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 25th day of February, A. D. 1914.

[Seal] ARTHUR LANG,  
Clerk, District Court, Territory of Alaska, Third  
Division. [138]

[Endorsed]: No. 2387. United States Circuit Court of Appeals for the Ninth Circuit. Cache Creek Mining Company, a Corporation, Plaintiff in Error, vs. Henry Brahenberg, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Received and filed March 10, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



No. 2387

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CACHE CREEK MINING COMPANY  
(a corporation),

*Plaintiff in Error,*

vs.

HENRY BRAHENBERG,

*Defendant in Error.*

---

## BRIEF FOR PLAINTIFF IN ERROR

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### Statement of the Case.

This is an action in ejectment for possession of a mining claim known as Placer Claim Number 1 above Discovery on Dollar Creek, a tributary of Cache Creek in the Yentna Mining District, Territory of Alaska.

Plaintiff in Error began the action in March, 1913, and in its complaint alleged that on July 28, 1905, one Joseph Anderson located the said Placer Claim according to the Mineral Land Laws, and thereafter transferred his title to it, and that thereby it became and was the owner and entitled

to the possession of said Placer Claim, and it further alleged an ouster of possession by the Defendant in Error in 1912, and it further alleged that it had complied with all the Mineral Land Laws.

The Defendant in Error thereafter in June, 1913, filed his answer to the complaint and in Paragraph II (Transcript, page 6) admits the validity of Plaintiff in Error's title in the following language:

“He admits that Joseph Anderson located Claim Number One above Discovery on Dollar Creek, and that he thereafter conveyed his interest in said claim to Plaintiff as alleged, but denies that Plaintiff has performed the annual labor required by law to hold said claim since the year 1909, denies that it has performed any labor upon said claim since 1909, and alleges that all of plaintiff's right to and in said claim became forfeited in the said claim, and all of it became a part of the public domain subject to location according to law as mineral land long prior to the year 1912. Defendant alleges that on the 1st day of August, 1912, he located said Claim Number One above Discovery on Dollar Creek according to law, and ever since has been and now is the owner thereof, subject to the paramount title of the United States and is in actual possession thereof.”

In his said answer he further alleges he holds possession adversely to the Plaintiff in Error, and further alleges in Paragraph VI (Tr. p. 8) as follows:

“By way of cross-complaint Defendant alleges that he located said Claim Number One above Discovery according to law, and there-

after within ninety days, to wit, on the..... day of August, 1912, filed a copy of his notice of location thereof in the office of the Recorder of Cook Inlet precinct, in which said claim is situated, and has ever since said location had actual possession of the same.”

The Plaintiff in Error in its reply filed thereafter in June, 1913, denies the affirmative allegations of the answer of Defendant in Error.

The case came on for trial on the 25th day of November, 1913, before Judge Robert W. Jennings, and a jury, at Valdez, Alaska, and on November 26, the jury returned a verdict for the Defendant in Error. Thereafter on the same day the Court denied Plaintiff in Error's motion for a new trial (Tr. p. 126) and entered its judgment in favor of Defendant in Error (Tr. p. 124) from which Plaintiff in Error now appeals.

#### CONTENTIONS.

Plaintiff in Error contends:

- (1) That the judgment is against the law in this:
  - (a) Plaintiff was and is entitled to a judgment on the pleadings.
  - (b) Forfeiture is an affirmative plea and Defendant in Error relied on a forfeiture without pleading same.
  - (c) The Defendant in Error testified and admits he knew the Plaintiff in Error owned the claim in dispute as well as five other claims and that in September, 1911, he saw the annual assessment work being performed by Joseph Anderson and others and admits Plaintiff in Error did three or four hundred dol-



lars' worth of work for the claim in dispute and the five other claims. Under these facts it was incumbent upon Defendant in Error to notify Plaintiff in Error of his intention to re-locate so that Plaintiff in Error could cast off any unrepresented claim or the excessive claim or claims in the group of claims before Defendant could initiate any title to any part or portion thereof.

- (2) That the Court erred in admitting the opinion of the witness Rimmer as to the value of the work done by Plaintiff in Error in September, 1911, on the claim in dispute.
- (3) That the Court erred in denying Plaintiff in Error's motion for a new trial.

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### Forfeiture.

#### (1) **THIRD ASSIGNMENT OF ERROR.**

The Court erred in entering judgment in said cause against the plaintiff and in favor of the defendant, for the reason that said judgment is against the law.

The Defendant in Error admits the validity of our location in his answer (Tr. p. 6) and relies upon a relocation of the same placer claim without pleading a forfeiture of our title. True, he denies that the Plaintiff has performed any labor *upon* said claim since 1909, but nowhere does he ever allege that the work *or improvements* were not done *for the benefit* of the claim.

The plea of forfeiture is an odious one. The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious.

*Lindley on Mines*, (Third Ed.) Vol. 2, Sec. 645;

*Mt. Diablo M. & M. Co. v. Callison*, 5 Saw. 439 (9 Morrison Min. Rep. 616);

*Book v. Justice M. Co.*, 58 Fed. 106.

Forfeiture as a defense to an action must be specifically pleaded.

*Lindley on Mines*, (Third Ed.) Vol. 2, Sec. 643, p. 1598;

*Renshaw v. Switzer*, (Montana) 13 Pac. 127;

*Bishop v. Baisley*, (Oregon) 41 Pac. 936;

*Altoona Q. M. Co. v. Integral Q. M. Co.*, (California) 45 Pac. 1047;

*Duncan v. Eagle Rock G. M. & R. Co.*, (Colorado) 111 Pac. 588.

## (2) FIRST ASSIGNMENT OF ERROR.

The Court erred in admitting the testimony of the witness Rimmer as to the value of the assessment work.

The Defendant in Error called Mr. John Rimmer as a witness, who testified in substance as follows:

I reside in Susitna, and have resided there about seven and one-half years. I have been working in the Yentna country mining and I am acquainted with the country around Dollar

Creek. I know Brahenburg, Bub and Anderson and have known them since 1906. I was at Falls Creek in 1911. I know the place along Dollar Creek where the Cache Creek Mining Company have started a ditch. In September, 1911, I was working about a mile or a little over from there mining. I afterwards saw the work that was done there. It was just plowing, scraping, preliminary work, about 1400 feet long. The going rate of wages in that district at that time was \$5 a day and board. I don't know what horses were worth up there.

Q. Are you familiar with the country there along Dollar Creek, that is, the character of the ground? A. Yes, sir. Q. Do you know about how much work it takes to move such dirt as was removed by the Cache Creek Mining Co. there? A. I think I do. Q. What would you say that work is worth? (By the Court). What is that work worth done the way the plaintiff says he did it, not what is it worth done some other way?

Judge LYONS. We object to it.

By the COURT. I think it is competent. The weight of it is with the jury. He may answer. The jury may take into consideration what kind of work it was and what he knows about it—the whole weight of the evidence will be with the jury; I think I will admit it.

(Plaintiff allowed an exception to the ruling of the Court.)

A. Why I think about \$150 would be a liberal allowance for that kind of work in the ditch.

On cross-examination the witness Rimmer testified in substance as follows:

I don't know how many days those horses worked up there. I could not tell what a horse is worth a day up there. I never use



horses. I use dogs altogether. I don't know how many days the horses worked there and I don't know how many horses worked there.

It was an invasion of the province of the jury and clearly error for the Court to permit the said witness Rimmer to hazard an opinion or guess of the value of the work done by Plaintiff in Error. It was for the jury to say how much the work was worth under all the evidence in the case. It was for the Court to tell the jury by instructions how to measure the value of the work.

The rules for measuring and estimating the value of annual assessment work is given by *Lindley on Mines*, Sec. 635, Vol. 2 (Third Ed.), and by the numerous cases therein cited.

“In estimating the value of the labor performed, the jury should consider the distance of the mine from the nearest point where labor can be procured, the cost of maintaining men while the labor was being performed, the current rate of wages, and any other necessary and reasonable expense which might be incurred in the performance of said labor.”

*Walton v. Wild Goose M. & T. Co.*, 123 Fed. 209.

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#### ASSESSMENT WORK.

We wish to call the Court's attention to the following testimony in regard to the amount and character of work done by the Plaintiff in Error as claimed by the Plaintiff in Error and as admitted by the Defendant.

## TESTIMONY OF JOSEPH ANDERSON.

(Tr. p. 18.) My name is Joseph Anderson. I am a miner by occupation. I have been superintendent on the ground and manager of the Cache Creek Mining Company for the last 3 years.

(Tr. p. 22.) The Cache Creek Mining Company owns six claims on Dollar Creek. They are named Zero, Palouse, Boston, No. 1 below Discovery, and No. 1 above. The Number 1 above Discovery is the claim in dispute in this action.

Q. Did you do the assessment work on that claim in 1911? A. We did. I did, not on the claim, but by ditching above it.

Q. How did you do the assessment work for this claim in the year 1911? A. By ditching on the bench.

(Tr. p. 24.) The intake of the ditch from Number 1 above on Dollar Creek is approximately two miles. The ditch was surveyed by me in 1911. I measured the ditch. It is 1600 feet. That work was done in September, 1911. The outfit was packed up at Dollar Creek and packed over there with horses and that ditching was in about two feet wide on the bottom and 18 inches on the lower lip and considerable more in places on the upper lip, the upper side. There were 3 horses.

(Tr. p. 25.) Q. How far is it from where you took that outfit to where this ditch is situated? A. It is about five miles.

Q. How many men were in the outfit? A. Three besides myself. Their names were Victor Carlson, George Winter and Andy Thomas and Charley Nawn worked at the warehouse and camp, packing up the outfit and things like that; helped us pack the horses. I was there myself all the time. I was there the 1st, 2d, 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th of September.

(Tr. p. 26.) Q. What did your outfit consist of? A. It consisted of supplies to use in the cookhouse, tents, stoves and everything to feed the men, a complete camp; horses, plows, scraper and tools, picks and shovels, etc., and everything that was needed to do that kind of work.

Q. I will ask you how many claims was this work to be applied on, as assessment work? A. Six claims.

Q.. On what stream? A. Dollar Creek.

Q. Is that all the property of the Cache Creek Mining Company? A. All the property of the Cache Creek Mining Company.

(Tr. p. 27.) You say you had 3 horses? A. Three horses.

Q. How many days were they at work? A. Nine days.

(Tr. p. 30.) I will ask you as a miner if that work that you did in that ditch tended to the development of the Claim Number 1 above on Dollar Creek? A. It did.

Q. In what way? A. By bringing water from it on the bench so that it can be piped by hydraulic methods.

(Tr. p. 31.) You say this claim, Number 1 above on Dollar, is right on Dollar Creek? A. It is on Dollar Creek.

Q. And how far would the creek be from that after it is constructed through? A. It is about 1500 feet from the rim.

(Tr. p. 32.) Q. Is it your intention to finish this ditch? A. It is.

Mr. RITCHIE. You mean the company's intention?

Judge LYONS. Yes, sir.

(Tr. p. 41.) And you had a continuous ditch, about 1600 feet, where you have indicated on the map? A. That is right, as near as I can remember.



Q. How deep was the ditch? A. It was an average of 18 inches on the lower lip.

Q. And how high on the upper lip? A. There was one place it was about 8 feet, but the most of it was pretty nearly a uniform depth of two feet or so.

Q. How wide was the ditch? A. Two feet on the bottom.

Q. Isn't it that way all the way through? A. All the way through with the exception of where it dropped off here and wasn't necessary.

(Tr. p. 43.) And the prevailing wages of a man up there is, you say, \$5.00 a day? A. Yes, sir, and board.

Q. And you figure board worth \$3.00 a day? A. I did then.

Q. How do you figure that? A. The cost of freighting in there and the wages.

Q. What are provisions worth in that vicinity of Cache Creek, that is, compared with prices down here on the coast—are they worth twice as much? A. I should judge more than that.

Q. If you add the freight? A. Yes.

Q. Is the freight the equal of the cost price here on the coast? A. I don't know what the cost price is here.

Q. You are not familiar with the prices here? A. No, never bought anything here.

Q. What does it cost by the ton to freight from Seldovia up to Cache Creek, ordinary provisions? A. I don't know what the freight rate is from Seldovia to Sheep Creek, but I should say approximately \$210 or \$215 a ton.

(Tr. p. 45.) Q. How do you get at the figure of \$15 a day for the horses? What is a horse worth up there? A. I want to correct that statement; I figured it out from notes and I find it was \$13 a day.

Q. What do you feed a horse up there from June to September—don't you turn him out on the grass? A. Not when we are working him, feed him entirely grain and hay.

Q. But the horses do graze a great deal? A. When they are not working.

Q. And you figure that a horse is worth \$13 a day? A. I do.

(Tr. p. 51.) Q. All the work you did for assessment work on those claims, to hold those claims, was this work you did on the ditch? A. It was.

Q. And you figured that as worth \$600? A. I did.

(Tr. p. 103.) Q. What was the cost of that work—to build that ditch? A. My figures when I stopped working on there was \$618, I think.

Q. In estimating that cost, did you charge anything for the tools used there? A. I did not.

Q. Did you charge anything for any other equipment there? A. No equipment whatever—charged nothing for breaking of hammers or tools or anything of that kind.

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**TESTIMONY OF DEFENDANT HENRY BRAHENBURG.**

(Tr. p. 66.) My name is Henry Brahenburg, I am the defendant in this action.

(Tr. p. 67.) I know Joseph Anderson. He was the manager of the Cache Creek Mining Company and had charge of all their work in 1911.

Q. You knew that fact? A. Yes, sir.

(Tr. p. 69.) Q. Now, did you see that work from time to time when it was being done? A. I would see it every day, yes. We were above timber line and everything was in plain sight.

Q. How high is that country around there, about what is the elevation? A. Three thousand or something like that, I guess; close to three thousand.

Q. Did you see the work when they finished it? A. Yes.

Q. How many men did you see working there? You say they were there every day, in 1911? A. There was two besides Anderson himself on the work.

Q. Who were those two men? A. George Winter and Victor Carlson.

Q. Did you know Andy Thomas? A. Yes.

Q. What did Andy Thomas do, if you saw him do anything? A. I didn't happen to see him; they were a mile or a mile and a half on Falls Creek; they had their camp over there.

Q. You saw the work when it was finished. Describe what that work was like when they quit and pulled off their men and horses. A. As near as I can describe it, it was just——

Q. Go to the plat and indicate to the jury the nature of the work and the length of it as you remember it. A. Well, there was about fourteen or fifteen hundred feet here; as near as I can describe it, it was just plowed out, no part of it looked like a ditch, no part of it would carry water, and it would cost more to complete it than they had already done. Half of it ain't plowed out and the other half I don't think would average more than six or ten inches; there is places where it is two feet deep, that is holes.

Q. What would you say was the average depth of the digging in that ditch? A. Six or eight or ten inches.

Q. And the average width? A. Well, two feet; something like that, I guess.

(Tr. p. 79.) Q. Did you see George Winters there in September, 1911? A. He was



working for the Cache Creek Mining Co. at that time and afterwards went to work for us.

Q. He was working for the Cache Creek Mining Co.? A. At that time, yes, 1911.

Q. What was he doing? A. He was driving the team.

Q. What was the team doing? A. Plowing furrows in that ditch.

Q. Do you know Victor Carlson? A. Yes, sir.

Q. What was he doing? A. I believe he was holding the scraper the best part of the time, and holding the plow when they were plowing.

(Tr. p. 80.) Do you know Andy Thomas? A. Yes, sir.

Q. Was he working there at that time? A. I believe he was doing their cooking over on Falls Creek.

(Tr. p. 82.) Q. Did you ever work for the Cache Creek Mining Co.? A. Yes, sir.

Q. When? A. The spring of 1910 the first time, and the spring of 1911 I worked for them. I worked five or six months for them altogether, something like that. I guess all told. The first time I quit was along in the middle of the summer of 1910, the first day of July, I believe it was; the other time I quit, I think it was getting along the first of June, in the spring of 1911, I believe. The Cache Creek Mining Co. was paying a hundred dollars a month and board to its men.

(Tr. p. 83.) Q. What is board worth up there? A. We always figure about two dollars a day.

Q. How do you figure that? A. Well, the cost of grub; the cost of freighting, getting it there and that is what the general camp figures it at, at \$7 a day to the man; that is \$5 a day and allow him \$2 a day for board;

that is the general rule of the camp. We never figured it out closely, but I think that is what it cost us, what little operations we done.

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**TESTIMONY OF LOUIS BUB.**

(Tr. p. 83.) My name is Louis Bub. I am a partner of the defendant Henry Brahenburg.

(Tr. p. 90.) Q. It is a fact that if this ditch is finished up it can be made a serviceable ditch, according to your testimony? A. There is no water to go through it.

Q. The ditch would be all right if there was water, wouldn't it? A. It is not now.

Q. I say, if there was—suppose there is water, if they finished it, it would be all right? A. Yes.

(By the COURT.) Q. Suppose they take your water? A. Then we will have to quit mining.

Q. Suppose they claim they are the owners of that water and intend to take it and you are going to have a lawsuit about it afterwards—do you think it would be serviceable, could they use it if they took your water—could they use it to take the water out of Dollar Creek that you are now using? A. Yes, sir; it is above our ditches; if they complete that ditch it will take the water out above our two ditches.

(Tr. p. 95.) Q. What would it cost to get stuff from where you were using these horses in where the work was done on the ditch? A. It wouldn't cost but very little more.

Q. It wouldn't cost but very little more? A. No, sir; we were freighting stuff in there, contracting to take stuff in there, for  $7\frac{1}{4}$  cents a pound.

Q. How much is that a ton? A. You can figure it out.

Q. That is a pretty good price per ton, is it not—about \$150 a ton? A. Yes.

As water is essential to the development and working of placers, expenditures made in constructing ditches, flumes and pipe-lines, for the purpose of conducting water to the property for use on such property, will undoubtedly satisfy the law.

*Lindley on Mines* (Third Ed.), Vol. 2, Sec. 631, p. 1562.

It is admitted that all the claims are contiguous and owned by Plaintiff in Error and that the character of the work was beneficial to any and all of the claims.

The land department has formulated a series of deductions from the adjudicated cases as to work done outside of a group of claims for the common benefit of all the claims. These deductions and the cases are given and considered by Judge Lindley in Sec. 631, Vol. 2, Third Ed. of his valuable work on mines, but we are unable to find any ruling by either the Courts or land department or any discussion by any text writer on mineral law on the right of a claim owner to apply to one claim beneficial work done outside the claim for a group of claims where the amount of work exceeds one hundred dollars, but is claimed insufficient in amount for the entire group.

From our examination of the subject, we believe the same principles of law involved in the case of



*Jones v. Wild Goose M. & T. Co.*, 177 Fed. 95, are involved, and the relocater before relocation should be compelled to notify the prior owner who should be given the right to elect if insufficient work was done without the group for all the claims but enough for some of them.

If five hundred dollars' worth of work was done by the agents of the owner under the belief that they had done six hundred dollars' worth of work for the claim in dispute and five more contiguous claims, why should the owner lose all the six claims? And if he caused the five hundred dollars' worth of work to be done on one of his claims for it and five contiguous claims, would it be contended he would lose all six claims?

It is impossible to read the record in this case and escape the conclusion that the verdict was contrary to the evidence and the court should have granted Plaintiff in Error's motion for a new trial.

The facts charged as the ground for the forfeiture must be established by clear and convincing proof.

*Justice Min. Co. v. Barclay*, 82 Fed. 554;

*Hammer v. Garfield M. & M. Co.*, 130 U. S. 291;

*McCulloch v. Murphy*, 125 Fed. 147.

The evidence shows the Plaintiff in Error in good faith paid and spent \$618.00 on its six claims; that said claims were located in the interior valley of Alaska over one hundred miles from the coast;

that it costs from \$150 to \$215 per ton for transporting supplies to the claims from the coast; that it is undisputed the work done was beneficial work; that our title was not disputed and even the good intentions and good faith of the Plaintiff in Error were unassailed.

Under these conditions we submit in conclusion the Court should reverse this case and relieve the Plaintiff in Error from such an obnoxious judgment.

Respectfully submitted,

JOHN LYONS,

JAMES E. FENTON,

WILLIAM A. GILMORE,

*Attorneys for Plaintiff in Error.*





No. 2387

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CACHE CREEK MINING COMPANY  
(a corporation),

*Plaintiff in Error,*

VS.

HENRY BRAHENBERG,

*Defendant in Error.*

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## BRIEF FOR DEFENDANT IN ERROR.

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### Statement of the Case.

In the trial court plaintiff in error was plaintiff and defendant in error was defendant. For convenience they will be referred to in this brief as plaintiff and defendant respectively.

This action seeks to determine the possessory title to a placer mining claim known as Number One Above Discovery, on Dollar creek, Yentna mining district, Alaska, and is in reality an action of ejectment, although plaintiff asked equitable relief by way of injunction, and defendant prayed that he be decreed to be owner of the claim, subject

to the paramount title of the United States. Plaintiff's brief inaccurately states that defendant's answer "admits the validity of plaintiff in error's title," in language thereafter quoted. The quotation shows that defendant, while admitting that plaintiff's grantor had once owned the claim and had conveyed whatever interest he held to plaintiff, expressly denied that plaintiff had any title to the claim, alleging that it had forfeited all its right thereto by failure to perform annual labor long prior to defendant's relocation of the same.

Defendant then set up his own location of the disputed claim and on a trial of the issues a jury returned a verdict in his favor, upon which judgment was entered. Plaintiff then sued out this writ of error.

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### Argument.

It is admitted that the only issue in the case was the question whether plaintiff had performed the annual labor required by law on or for the benefit of the claim in the year 1911, and the court so instructed the jury (R. 119). Plaintiff's claim of labor was that it had done work to the value of \$618 on a water ditch intended to carry water to a group of six claims, including the claim in dispute. The defendant offered some evidence tending to show that the ditch would be of little value, if completed, because all the water in the creek proposed to be tapped had already been appropriated

by defendant except at occasional short periods of high water, and that the work had no real permanent value because of the defective manner in which it was done, but the main issue was as to the value or reasonable cost of the work, defendant's witnesses testifying that the value and cost of the work fell far short of the \$600 necessary to hold the group of six claims.

Though plaintiff seeks to set up several assignments of error it appears to defendant that there are really only two issues arising on this appeal. First: Did the trial judge commit any substantial error in his rulings or instructions? Second: Was the evidence on the whole sufficient to justify the verdict? It was admitted that plaintiff or its grantor once owned the claim, and it was not disputed that defendant's relocation in 1912 was valid if the ground had reverted to the public domain through plaintiff's failure to do annual labor. Though defendant pleaded that plaintiff had done no assessment work since 1909 the testimony was confined to the year 1911. The jury's verdict for the defendant was a finding that plaintiff failed to do the required annual labor in 1911, and this verdict was returned under an express instruction of the court that defendant must prove that fact by a preponderance of testimony. We quote from the instructions (R. 119):

"If you believe that it has been established by a preponderance of the evidence in this case that the plaintiff did not in the year 1911 do one hundred dollars worth of work on said



claim, or to develop said claim—the work need not be done right on the claim, if it was done to develop the claim—then on the 31st day of December, 1911, the claim became forfeited and open to relocation by any one else.

“The defendants in this case claim and have offered evidence to prove that they relocated the claim according to law and there has been no evidence to the contrary, but this is not all they have to prove—they have to prove to you by a preponderance of the evidence that one hundred dollars worth of work was not done by the plaintiff in the year 1911.

“In other words, having admitted that the plaintiff had a good and indefeasible title and claiming as they do—that is, the defendants claiming as they do—that that title has been forfeited by the failure to perform assessment work, the burden is upon them to prove to you that the assessment work has not been done.”

The instructions, in the opinion of defendant, were as strongly in favor of plaintiff as they could be made under the law. Plaintiff's counsel took no exception to any of them. Defendant excepted to the instruction that the burden was upon defendant to prove by a preponderance of evidence that plaintiff did not do the required assessment work in 1911 (R. 122). This exception is of no importance since defendant is not appealing, except as showing that at the time the only objection to the instructions came from the party who afterward received the verdict.

The instruction quoted was based upon the law as laid down by this court in *Thatcher v. Brown*, 190 Fed. 708, construing the Act of Congress of

March 2, 1907, governing annual labor on mining claims in Alaska. In that decision it was held that the requirement of \$100 worth of work on or for the benefit of a mining claim must be done "during the year", and that failure to do the whole amount of work required within the year entails a forfeiture by operation of law at the expiration of the year. The language of the act is:

"Such claim shall become forfeited and open to relocation by others as if no location of the same had ever been made."

It was under the law of 1907, so construed by this court, that defendant located the disputed claim, "as if no location of the same had ever been made", and the jury, fairly and fully instructed by the court on the law of the case, found that the facts made his location good.

In this case the ordinary rules of forfeiture do not apply. A forfeiture can scarcely be said to be odious when it results from failure to comply with an explicit requirement of law with no chance of recovery or reinstatement such as is contained in the general mining law of 1872. Yet defendant can go further and safely say that the authorities cited by plaintiff's counsel do not strengthen its case. In their "Contentions" counsel urge that plaintiff was and is entitled to a judgment on the pleadings. Since no motion for such a judgment was made in the trial court it is difficult to see how the court could have entered such a judgment, and it is somewhat late for plaintiff to ask for such judgment

on appeal. The pleadings were certainly broad enough to permit the admission of testimony, and if defendant's answer and cross-complaint were formally defective the defect was cured by the verdict as the record stands.

Plaintiff's counsel also urge that forfeiture is an affirmative plea and that defendant relied on a forfeiture without pleading the same. To sustain this contention they call attention to the averment in defendant's answer that plaintiff had done no work "on the claim since 1909". Since work done for the benefit of a claim is held to be constructively on the claim whether actually on the claim or not the averment in the pleading covers everything the law contemplates, and if not as explicit as painful accuracy might demand was broad enough to be made complete by the verdict.

The general mining law of 1872 requires labor or improvements annually "on each claim", and that "where claims are held in common such expenditure may be made upon any one claim". Yet the courts have uniformly held from the beginning that "on" or "upon" a claim meant for the development of the claim and might be done outside its boundaries. That being the construction of "on" and "upon" in the act the same construction is to be placed upon those terms in a pleading which involves the mining law.

Examination of the authorities cited by plaintiff on the question of pleading a forfeiture shows that they do not fit the argument. In *Duncan v. Eagle*



Rock Co. 111 p. 588, the Colorado supreme court held that a forfeiture may be proven under a general denial (p. 594). Further that a claimant must himself show that he performed the annual labor for at least the preceding year. In *Bishop v. Baisley*, 41 p. 936, the Oregon supreme court held that after pleading facts it is unnecessary to say that thereby the claim was forfeited''. The opinion further says:

“Under our practice technical forms of pleading are abolished and it is now only necessary to set forth the facts constituting the cause of action or defense, concisely, without unnecessary repetition. Not having been tested by demurrer, the allegations of forfeiture are sufficient after trial.” (p. 938.)

*Lindley on Mines*, Vol. 2, sec. 645, cited by plaintiff, contains the following:

“While it is often said that a forfeiture can be shown only upon clear and convincing evidence, the proof is made as required whenever it is shown by a preponderance of the evidence that the full amount of annual labor or improvements was not made or expended within a given year.”

*Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, is cited by plaintiff on the question of forfeiture. It is a case often cited, but all the court decided on the question of forfeiture was that the proof must be clear, and that in the particular instance the evidence of the defendant “was meager and unsatisfactory and was completely overborne by the evi-

dence of the plaintiff''. The jury had found for the plaintiff on the facts.

Certainly the finding of the jury in the case at bar, upheld by the trial judge in denying the motion for a new trial, ought to be conclusive on the facts, unless plainly against the weight of evidence. Casual perusal of the testimony, defendant confidently asserts, will convince any unbiased mind that the preponderance of testimony was in favor of defendant, as the jury found.

Plaintiff insists that the court erred in allowing the witness Rimmer to testify that the value of the work done did not exceed \$150 in value for six claims. Plaintiff's brief quotes Rimmer's testimony, showing that he was familiar with the ditch work claimed by plaintiff for annual labor in 1911; that he was working close by while the work was in progress, and had seen it frequently after it was done; that he was familiar with the going wages and cost of living on the creek and in the district generally. Yet plaintiff complains that Rimmer was permitted by the court "to hazard an opinion or guess of the value of the work done by plaintiff".

On the question of the cost and value of assessment work plaintiff cites *Walton v. Wild Goose Co.*, 123 Fed. 209. On page 216 of the opinion the following is found:

"The qualification of any witness to express an opinion should always be made to appear to the satisfaction of the court. Opinion evidence,

like expert testimony, is of but little, if any, value unless connected with a full statement of the facts within his own knowledge."

Witness Rimmer showed a very considerable knowledge of all the attendant facts. A residence of seven years in a mining district ought to have given him a fairly accurate knowledge of conditions.

Counsel cite Lindley, sec. 635, Vol. 2, on the question of estimating the value of assessment work. The same section contains the following, the first paragraph being quoted from the Montana supreme court:

"In determining the amount of work done upon a claim, or improvements placed thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars."

"A mere expenditure is not of itself sufficient. The work must tend to develop the claim, and be of the reasonable value claimed."

In *McCulloch v. Murphy*, 125 Fed. 147, cited by plaintiff, the following is found:

"One of the main tests of determining this question is not what was paid for it, or the contract price, but whether or not the labor, work and improvements were reasonably worth the said sum of one hundred dollars."

Defendant reiterates that the verdict of the jury and the denial of plaintiff's motion for a new trial



disposes of the one issue of fact in the case—whether or not plaintiff did sufficient assessment work on in the year 1911, but to make it clear to this court that the evidence was ample to support the verdict will quote briefly from the record.

At the outset defendant urges that there is no merit in plaintiff's contention that before relocating the claim "it was incumbent upon defendant to notify plaintiff of his intention to relocate so that plaintiff could cast off any unrepresented claim or the excessive claim or claims in the group of claims before defendant could initiate any title to any part or portion thereof". No statute makes any such requirement, and the act of 1907 gives a claimant opportunity to show good faith by recording proof of labor. On page 22 of the record it appears that counsel for plaintiff on the trial stated that he had in the courtroom such affidavits. Counsel for defendant stated that they were not in the form required by law, and no offer to introduce them was made.

Joseph Anderson, manager of the plaintiff corporation, and its chief witness on the trial, testified that the ditch work claimed as annual labor for 1911 was done for the group of six claims on Dollar Creek (R. 22-3-4-5-6). Three of these were association claims (see map, plaintiff's Exhibit A). Mr. Anderson testified (R. 26):

"Q. I will ask you how many claims was this work to be applied on, as assessment work?  
A. Six claims."

Much other testimony of Anderson is given in plaintiff's brief. He stated positively that he did \$618 worth of work, according to his method of computation, for six claims; that he claimed \$267 for men and their board and \$351 for horses and their keep (R. 105-6-7).

It is not correct, as counsel say in their brief, that defendant admits that plaintiff did \$300 or \$400 worth of work, though counsel may be able to deduce those figures from statements made by defendant's witnesses as to wages and cost of living. Louis Bub, defendant's partner, testified (R. 92), that he and defendant had built a ditch practically parallel to the one plaintiff started, and completed it, 3000 feet long, for \$800. This ditch is two feet deep and four feet wide and carries water effectively. Plaintiff's "ditch" is half as long, is not complete at any place, and much of it is merely a shallow furrow (see photographic exhibits (R. 11-12-13). These photographs were taken soon after the work was done in September, 1911 (R. 71-2-3).

In order to make up the \$618 worth of work Manager Anderson put in eight days for each of four men; himself at \$150 a month, a cook at \$125 a month, and two miners at \$100 a month, and board for each of the men at \$3 a day. In making up the cost of \$3 a day per man for board he included the wages of the cook, although he also charges that as another laborer. He also charges for extra work in getting the outfit to Dollar creek

from Cache creek. That is, he charges the entire cost of getting provisions on the ground as an item and then seeks credit for \$3 a day for each man's board because of the enormous expense of getting in provisions. Then he charges \$13 a day for three horses, including the day he moved his camp outfit over, although he admitted that only two horses worked at a time. This interesting calculation appears on pages 104-5-6 of the record.

Defendant Bahrenburg testified that board in the vicinity of Dollar creek is generally estimated to be worth \$2 a day per man, this covering every item of its cost (R. 83). Bahrenburg and Bub testified without contradiction that in January, 1912, they hired from the defendant, the Cache Creek Company, seven horses, four men, and a full outfit of sleds for freighting, at \$100 a day, the company furnishing board for the men and feed for the horses (R. 78-93-94). They also testified that freighters and packers regularly charge \$10 a day for horses in the district (R. 72-87).

The testimony of defendant's witnesses as to the cost of work by men and horses, allowing plaintiff for all the time claimed, makes the work done by plaintiff much less than \$600. Further tending to reduce the value of the work is the estimates of its value already noted in the testimony of Bub and Rimmer, and the testimony of Bahrenburg that the work was practically valueless (R. 75-6). Also the testimony of Bahrenburg and Bub that while Anderson was doing the work he told them he had



orders to start the ditch for assessment work but did not know whether it would ever be used or not (R. 67-85). This was positively denied by Anderson.

It is plain that the jury took the view that the work was far short, in value, of the amount required by law, and upon that finding based their verdict, which the trial judge did not see fit to disturb.

Defendant in error respectfully submits that the judgment of the district court of Alaska is fully justified by the record.

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